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2. The authority citation for Part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub.L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub.L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub.L. 103-206, 107 Stat. 2149; Title IV, Pub.L. 105-277, 112 Stat. 2681; Pub.L. 106-95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub.L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub.L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub.L. 105-277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub.L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182 (m) and 1184; and 29 U.S.C. 49 *et seq.*

3. Section 655.700 is revised to read as follows:

§ 655.700 What statutory provisions govern the employment of H-1B nonimmigrants and how do employers apply for an H-1B visa?

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H-1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

- (i) 195,000 in fiscal year 2001;
- (ii) 195,000 in fiscal year 2002;
- (iii) 195,000 in fiscal year 2003; and
- (iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H-1B visas and specifies the qualifications that are required for entry as an H-1B nonimmigrant ;

(3) Requires an employer seeking to employ H-1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H-1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H-1B visa classification.* Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035) may be obtained from <http://ows.doleta.gov>, from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see § 655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I-129), together with the certified LCA, to INS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I-129) may be obtained from an INS district or area office.

(3) If INS approves the H-1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H-1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H-1B visa

classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§ 655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to "H-1B nonimmigrant" apply to any Mexican citizen nonimmigrant who is classified by INS as "TN." In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106-95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

4. Section 655.705 is revised to read as follows:

§ 655.705 What federal agencies are involved in the H-1B program, and what are the responsibilities of those agencies and of employers?

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H-1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an

employer's misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants.

(b) *Department of Justice (DOJ) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H-1B visas. The Department of Justice, through the Immigration and Naturalization Service (INS), accepts the employer's petition (INS Form I-129) with the DOL-certified LCA attached. INS is responsible for approving the nonimmigrant's H-1B visa classification. In doing so, the INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers the system for the enforcement and disposition of complaints regarding an H-1B-dependent employer's or willful violator employer's failure to offer a position filled by an H-1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H-1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)-(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 in the manner prescribed in § 655.720. By completing and signing the LCA, the employer agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided

to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U.S. workers who are equally or better qualified than the H-1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce or in the workforce of a second employer with whom the H-1B nonimmigrant(s) is placed with indicia of employment by that employer (8 U.S.C. 1182(n)(1)(E)-(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make the LCA and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified LCA to INS with a completed petition (INS Form I-129) requesting H-1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the worker authorization to work in the United States for that employer or, in the case of a nonimmigrant who is already in H-1B status and is changing employment to another H-1B employer, until the new employer files a petition supported by a certified LCA.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

5. Section 655.710 is revised to read as follows:

§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

6. Section § 655.715 is amended to revise the definition of "Area of intended employment", to add the definition of "Employed, employed by the employer or employment relationship", to revise the definition of "Employer", to revise the definition of "Employment and Training Administration (ETA)", to add the definition of "Office of Workforce Security (OWS)", to revise the definitions of "Place of employment" and "State Employment Security Agency (SESA)", to remove the definition of "United States Employment Service", and to add the definition of "United States worker (U.S. worker)", to read as follows:

§ 655.715 Definitions.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of

employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

* * * * *

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.

Employment and Training Administration (ETA) means the agency within the Department which includes the Office of Workforce Security (OWS).

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Office of Workforce Security (OWS) means the agency of the Department which is charged with administering the national system of public employment offices.

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

(i) *Employee developmental activity.* An H-1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than "on-the-job-training" at a location where the employee is

stationed and regularly works). For the H-1B worker participating in such activities, the location of the activity would not be considered a "place of employment" or "worksite," and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H-1B program requirements with regard to that employee at that location. However, if the employer uses H-1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be "places of employment" or "worksites" for any such employees and, thus, would be subject to H-1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a "place of employment" or "worksite" if the following three requirements (i.e., paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a "strikebreaker" (i.e., the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of "non-worksite" locations based on worker's job functions: A computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions; a sales representative

making calls on prospective customers or established customers within a "home office" sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of "worksite" locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her "home office;" an auditor who works for extended periods at the customer's offices; a physical therapist who "fills in" for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an "as needed" basis at hospitals, nursing homes, or clinics.

(4) Whenever an H-1B worker performs work at a location which is not a "worksite" (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's "place of employment" or "worksite" for purposes of H-1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station "place of employment" rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a "worksite"/"place of employment" for an H-1B nonimmigrant, the employer is required to provide reimbursement to the H-1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's "place of employment" or "worksite," the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H-1B nonimmigrant's purported "place of employment" is a location other than where the worker spends most of his/her work time, or where the purported "area of employment" does not include the location(s) where the

worker spends most of his/her work time.

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State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

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United States worker ("U.S. worker") means an employee who is either

(1) A citizen or national of the United States, or

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by the Attorney General) to be employed in the United States.

7. Section 655.720 is revised to read as follows:

§ 655.720 Where are labor condition applications to be filed and processed?

(a) *Facsimile transmission (FAX)*. If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1-800-397-0478 (regardless of the intended place of employment for the H-1B nonimmigrant(s)). (Note to paragraph (a): The employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1-800-397-0478 number designated for this purpose.) The cover pages to Form ETA 9035 (*i.e.*, Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail*. If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

(c) *All matters other than the processing of LCAs (e.g., prevailing wage challenges by employers)* are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

8. Section 655.721 is added to read as follows:

§ 655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?

(a) The Regional Certifying Officers in the ETA regional offices are responsible for administrative matters under this subpart other than the processing of LCAs (*e.g.*, prevailing wage challenges by employers). (Note to paragraph (a): LCAs are filed by employers and processed by ETA only in accordance with § 655.720.)

(b) The ETA regional offices with responsibility for labor certification programs are—

(1) Region I Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): J.F.K. Federal Building, Room E-350, Boston, Massachusetts 02203. Telephone: 617-565-4446.

(2) Region I New York (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212-337-2186.

(3) Region II (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Suite 825 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106-3315. Telephone: 215-861-5250.

(4) Region III (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Atlanta Federal Ctr., 100 Alabama St., NW, Suite 6M-12, Atlanta, Georgia 30303. Telephone: 404-562-2115.

(5) Region IV (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming): 525 Griffin Street, Room 317, Dallas, Texas 75202. Telephone: 214-767-4989.

(6) Region V (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312-353-1550.

(7) Region VI (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington): P.O. Box 193767, San Francisco, California 94119-3767. Telephone: 415-975-4601.

(c) The ETA website at <http://ows.doleta.gov> will be updated to reflect any changes in the information contained in this section concerning the ETA regional offices.

9. Section 655.730 is revised to read as follows:

§ 655.730 What is the process for filing a labor condition application?

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of "employer" set forth in § 655.715 and intends to employ an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in

§ 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA shall process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (*i.e.*, either FAX or U.S. Mail as prescribed in § 655.720) and shall make a determination to certify or not certify the LCA within seven working days of the date the LCA is received and date stamped by ETA. If the LCA is submitted by FAX, the LCA containing the original signature shall be maintained by the employer as set forth at § 655.760(a)(1).

(c) *What is to be submitted?* Form ETA 9035.

(1) *General.* One completed and dated original Form ETA 9035 bearing the employer's original signature (or that of the employer's authorized agent or representative) shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720. The signature of the employer or its authorized agent or representative on Form ETA 9035 acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Form ETA 9035 as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference in Form ETA 9035. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at <http://ows.doleta.gov>. Each Form ETA 9035 shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H-1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H-1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H-1B nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.*, name of published survey) relied

upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SESA must be identified along with the wage; and

(vii) The employer's status as to whether or not the employer is H-1B-dependent and/or a willful violator, and, if the employer is H-1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H-1B nonimmigrants.

(2) *Multiple positions and/or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions cannot be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrants no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions,

which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H-1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H-1B nonimmigrants by providing a copy of the LCA to each H-1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) The employer has determined its status concerning H-1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated whether the LCA will be used only for exempt H-1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Employer Identification Number (EIN)), *provided that* the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s)

who become employees of the new employing entity;

(iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H-1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H-1B dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H-1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H-1B dependency and/or willful-violator status and § 655.737 concerning exempt H-1B nonimmigrants, in the event that such entity seeks to hire new H-1B nonimmigrant(s) or to extend the H-1B status of existing H-1B nonimmigrants. (See § 655.736(d)(6).)

10. Section 655.731 is revised to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

An employer seeking to employ H-1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay

the H-1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. "Legitimate business factors," for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.*, they have substantially the same duties and responsibilities as the H-1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.*, cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not

required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(1) Where an SCA wage determination for an occupational classification in the computer industry states a rate of \$27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial "cap" in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another source for wage information (*e.g.*, Bureau of Labor Statistics' Occupational Employment Statistics Survey).

(2) Except as provided in paragraph (a)(2)(i)(B)(1) of this section, for purposes of the determination of the H-1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a worker is employed on a contract subject to the SCA or whether the worker would be exempt from the SCA through application of the SCA/FLSA "professional employee" exemption test (*i.e.*, duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H-1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H-1B employee(s) to perform services under an SCA-covered contract may find that the H-1B employees are required to be paid the SCA rate as the H-1B prevailing wage even though non-H-1B employees

performing the same services may be exempt from the SCA.

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) or (ii) of this section, the prevailing wage shall be the weighted average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation. This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will determine the prevailing wage using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage, which shall in no event be for less than 90 days or more than one year from the date of the SESA's issuance of the determination.

(1) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of

the wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See subpart E of 20 CFR part 658. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(2) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H-1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(3) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other

legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, "similarly employed" means "having substantially comparable jobs in the occupational classification in the area of intended employment," except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vii) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*i.e.*, either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H-1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) through (iii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(viii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research

organization, or a Governmental research organization as these terms are defined in 20 CFR 656.40(c), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(ix) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H-1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H-1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H-1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H-1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H-1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not "relate back" to operate as an "update" of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H-1B employees based on different prevailing wage rates stated in applicable LCAs. Every H-1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

(3) Once the prevailing wage rate is established, the H-1B employer then shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H-1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement

required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H-1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

- (i) Employee's full name;
- (ii) Employee's home address;
- (iii) Employee's occupation;
- (iv) Employee's rate of pay;
- (v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis (e.g., hourly, piece-rate; commission); or

(B) With respect only to H-1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

(vi) Total additions to or deductions from pay each pay period, by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.

(viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):

(A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (e.g., summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);

(B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;

(C) Evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;

(D) For multinational employers who choose to provide H-1B nonimmigrants with "home country" benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H-1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c). Such documentation shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (b)(3)(ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the

occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination. For purposes of this paragraph (b)(3)(iii)(C), a prevailing wage provided by another legitimate source of such wage information shall be one which:

(1) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(2) Is based on the most recent and accurate information available; and

(3) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions

authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.*, an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (*i.e.*, unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.*, they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.*, recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.*, cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and

may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.*, full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided that* such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

(ii) The benefits received by the H-1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), *provided that* the H-1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (*e.g.*, elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits) or, in those instances where the employer is part of a multinational corporate operation, the benefits received by the H-1B nonimmigrant are provided in accordance with an employer's practice that satisfies the requirements of paragraph (c)(3)(iii)(B) or (C) of this section. In all cases, however, an employer's practice must comply with the requirements of any applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17).

(iii) If the employer is part of a multinational corporate operation (*i.e.*, operates in affiliation with business entities in other countries, whether as subsidiaries or in some other arrangement), the following three options (*i.e.*, (A), (B) or (C)) are available to the employer with respect to H-1B nonimmigrants who remain on the "home country" payroll.

(A) The employer may offer the H-1B nonimmigrant(s) benefits in accordance with paragraphs (c)(3)(i) and (ii) of this section.

(B) Where an H-1B nonimmigrant is in the U.S. for no more than 90 consecutive calendar days, the employer during that period may maintain the H-

1B nonimmigrant on the benefits provided to the nonimmigrant in his/her permanent work station (ordinarily the home country), and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers, *provided that* the employer affords reciprocal benefits treatment for any U.S. workers (*i.e.*, allows its U.S. employees, while working out of the country on a temporary basis away from their permanent work stations in the United States, or while working in the United States on a temporary basis away from their permanent work stations in another country, to continue to receive the benefits provided them at their permanent work stations). Employers are cautioned that this provision is available only if the employer's practices do not constitute an evasion of the benefit requirements, such as where the H-1B nonimmigrant remains in the United States for most of the year, but briefly returns to the "home country" before any 90-day period would expire.

(C) Where an H-1B nonimmigrant is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated that the worker will likely remain in the U.S. more than 90 consecutive days), the employer may maintain the H-1B nonimmigrant on the benefits provided in his/her home country (*i.e.*, "home country benefits") (and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers) *provided that* all of the following criteria are satisfied:

(1) The H-1B nonimmigrant continues to be employed in his/her home country (either with the H-1B employer or with a corporate affiliate of the employer);

(2) The H-1B nonimmigrant is enrolled in benefits in his/her home country (in accordance with any applicable eligibility standards for such benefits);

(3) The benefits provided in his/her home country are equivalent to, or equitably comparable to, the benefits offered to similarly employed U.S. workers (*i.e.*, are no less advantageous to the nonimmigrant);

(4) The employer affords reciprocal benefits treatment for any U.S. workers while they are working out of the country, away from their permanent work stations (whether in the United States or abroad), on a temporary basis (*i.e.*, maintains such U.S. workers on the benefits they received at their permanent work stations);

(5) If the employer offers health benefits to its U.S. workers, the employer offers the same plan on the same basis to its H-1B nonimmigrants

in the United States where the employer does not provide the H-1B nonimmigrant with health benefits in the home country, or the employer's home-country health plan does not provide full coverage (*i.e.*, coverage comparable to what he/she would receive at the home work station) for medical treatment in the United States; and

(6) *the employer offers H-1B nonimmigrants who are in the United States more than 90 continuous days those U.S. benefits which are paid directly to the worker (e.g., paid vacation, paid holidays, and bonuses).*

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.*, recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(4) For *salaried employees*, wages will be due in prorated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that*, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.*, a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. An employer that is a school or other educational institution may apply an established salary practice under which the employer pays to H-1B nonimmigrants and U.S. workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, *provided that* the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment and the application of the salary practice to the nonimmigrant does not otherwise cause him/her to violate any condition of his/her authorization under the INA to remain in the U.S.

(5) For *hourly-wage employees*, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the

employee's ordinary pay period (*e.g.*, weekly) but in no event less frequently than monthly.

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer.

(i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "enter into employment" when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H-1B nonimmigrant has not yet "entered into employment" with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H-1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) *Wage obligation(s) for H-1B nonimmigrant in nonproductive status.*

(i) *Circumstances where wages must be paid.* If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a

designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the INS and incorporated by reference on the LCA. If the I-129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.* If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(8) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the

following three sets of criteria (*i.e.*, paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (e.g., income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*), *except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status));

(C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-

employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (*i.e.*, paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that *liquidated damages* are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties,

and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression.

Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.*, the percentage of the employment contract completed). (*See, e.g., Vanderbilt University v. DiNardo*, 174 F.3d 751 (6th Cir. 1999) (applying Tennessee law); *Overholt Crop Insurance Service Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (applying Minnesota and South Dakota law); *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999); *Wojtowicz v. Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (Colo.Ct.App. 1998); *see generally*, Restatement (Second) Contracts § 356 (comment b); 22 Am.Jur.2d Damages §§ 683, 686, 690, 693, 703). In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty. (Note to paragraph (c)(10)(i)(C): The \$500/\$1,000 filing fee under section 214(c)(1) of the INA can never be included in any liquidated damages received by the employer. *See* paragraph (c)(10)(ii), which follows.)

(ii) *A rebate of the \$500/\$1,000 filing fee paid by the employer under Section 214(c)(1) of the INA.* The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the \$500 additional filing fee (for a petition filed prior to December 18, 2000) or \$1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H-1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the \$500/\$1,000 filing fee (*see* paragraph (c)(10)(i) of this section). If the filing fee is paid by a third party and the H-1B nonimmigrant reimburses all or part of

the fee to such third party, the employer shall be considered to be in violation of this prohibition since the employer would in such circumstances have been spared the expense of the fee which the H-1B nonimmigrant paid.

(11) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful).

(12) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(13) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(9)(iii) of this section.

(d) *Enforcement actions.* (1) In the event of an investigation pursuant to subpart I of this part, concerning a failure to meet the "prevailing wage" condition or a material misrepresentation by the employer regarding the payment of the required wage, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or insufficient to determine the prevailing wage (*e.g.*, does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact

ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment Service complaint system (*see* paragraph (d)(2), which follows), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (*See* 20 CFR part 658, subpart E.) Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office which services the State in which the place of employment is located (*see* § 655.721 for the ETA regional offices and their jurisdictions). Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

11. Section 655.732 is revised to read as follows:

§ 655.732 What is the second LCA requirement, regarding working conditions?

An employer seeking to employ H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H-1B nonimmigrant(s) is(are) employed by the employer.

(b) *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H-1B nonimmigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

12. The title to § 655.733 is revised to read as follows:

§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?

13. Section 655.734 is amended by revising the title and by revising paragraphs (a) (1) (ii) and (a) (2) and by adding paragraph (a)(3), to read as follows:

§ 655.734 What is the fourth LCA requirement, regarding notice?

* * * * *

(a) * * *

(1) * * *

(i) * * *

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the LCA is filed with ETA, provide a notice of the filing of the LCA. The notice shall indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement:

"Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor." If the employer is an H-1B-dependent employer or a willful violator, and the LCA is not being used only for exempt H-1B nonimmigrants, the notice shall also set forth the nondisplacement and recruitment obligations to which the employer has attested, and shall include the following additional statement: "Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530." The notice shall be provided in one of the two following manners:

(A) *Hard copy notice*, by posting a notice in at least two conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).

(1) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice(s).

(2) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and

health notices required by 29 CFR 1903.2(a).

(3) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(B) *Electronic notice*, by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B nonimmigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed. Such notification shall be given on or within 30 days before the date the labor condition application is filed, and shall be available to the affected employees for a total of 10 days, except that if employees are provided individual, direct notice (as by e-mail), notification only need be given once during the required time period. Notification shall be readily available to the affected employees. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board" to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the "intranet" which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (*i.e.*, a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (*e.g.*, contractor arranges to have notice on customer's intranet accessible to affected employees). Where employees lack practical computer access, a hard copy must be posted in accordance with paragraph (a)(1)(ii)(A) of this section, or the employer may provide employees individual copies of the notice.

(2) Where the employer places any H-1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard-copy notice(s) at such worksite(s), in the manner described in paragraph (a)(1) of this section, on or before the date any H-1B nonimmigrant begins work.

(3) The employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B nonimmigrant with a copy of the LCA (Form ETA 9035) certified by the Department. Upon request, the employer shall provide the H-1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.

* * * * *

14. Section 655.735 is revised to read as follows:

§ 655.735 What are the special provisions for short-term placement of H-1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of §§ 655.730 through 655.734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H-1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H-1B nonimmigrant(s).

(3) For every day the H-1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not

exceed a total of 30 workdays in a one-year period for any H-1B nonimmigrant at any worksite or combination of worksites in the area, *except that* such placement or assignment of an H-1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H-1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (e.g., the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H-1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (e.g., the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

(d) For purposes of this section, the term *workday* shall mean any day on which an H-1B nonimmigrant performs any work at any worksite(s) within the area of short-term placement or assignment. For example, three workdays would be counted where a nonimmigrant works three non-consecutive days at three different worksites (whether or not the employer owns or controls such worksite(s)), within the same area of employment. Further, for purposes of this section, the term *one-year period* shall mean the calendar year (i.e., January 1 through December 31) or the employer's fiscal year, whichever the employer chooses.

(e) The employer may not make short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) under this section at worksite(s) in any area of employment for which the employer has a certified LCA for the occupational classification. Further, an H-1B nonimmigrant entering the U.S. is required to be placed at a worksite in accordance with the approved petition and supporting LCA; thus, the nonimmigrant's initial placement or assignment cannot be a short-term placement under this section. In addition, the employer may not continuously rotate H-1B nonimmigrants on short-term placement or assignment to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with flexibility in assignments

to afford enough time to obtain an approved LCA for an area where it intends to have a continuing presence (e.g., an employer may not rotate H-1B nonimmigrants to an area of employment for 20-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA; such an employer would violate the short-term placement provisions).

(f) Once any H-1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H-1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (i.e., the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H-1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph (d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H-1B nonimmigrants in that occupational classification in that area of employment.

(g) An employer is not required to use the short-term placement option provided by this section, but may choose to make each placement or assignment of an H-1B nonimmigrant at worksite(s) in a new area of employment pursuant to a new LCA for such area. Further, an employer which uses the short-term placement option is not required to continue to use the option. Such an employer may, at any time during the period identified in paragraphs (c) and (d) of this section, file an LCA for the new area of employment (performing all actions required in connection with such LCA); upon certification of such LCA, the employer's obligation to comply with this section concerning short-term placement shall terminate. (However, see § 655.731(c)(9)(iii)(C) regarding payment of business expenses for

employee's travel on employer's business.)

15. Section 655.736 is added to read as follows:

§ 655.736 What are H-1B-dependent employers and willful violators?

Two attestation obligations apply only to two types of employers: H-1B-dependent employers (as described in paragraphs (a) through (e) of this section) and employers found to have willfully violated their H-1B obligations within a certain five-year period (as described in paragraph (f) of this section). These obligations apply only to certain labor condition applications filed by such employers (as described in paragraph (g) of this section), and do not apply to LCAs filed by such employers solely for the employment of "exempt" H-1B nonimmigrants (as described in paragraph (g) of this section and § 655.737). These obligations require that such employers not displace U.S. workers from jobs (as described in § 655.738) and that such employers recruit U.S. workers before hiring H-1B nonimmigrants (as described in § 655.739).

(a) *What constitutes an "H-1B-dependent" employer?*

(1) "H-1B-dependent employer," for purposes of THIS subpart H and subpart I of this part, means an employer that meets one of the three following standards, which are based on the ratio between the employer's total work force employed in the U.S. (including both U.S. workers and H-1B nonimmigrants, and measured according to full-time equivalent employees) and the employer's H-1B nonimmigrant employees (a "head count" including both full-time and part-time H-1B employees) —

(i)(A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than seven H-1B nonimmigrants;

(ii)(A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than 12 H-1B nonimmigrant; or

(iii)(A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and

(B) Employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(2) "Full-time equivalent employees" (FTEs), for purposes of paragraph (a) of this section are to be determined according to the following standards:

(i) The determination of FTEs is to include only persons employed by the employer (as defined in § 655.715), and does not include *bona fide* consultants and independent contractors. For purposes of this section, the Department will accept the employer's designation of persons as "employees," provided that such persons are consistently treated as "employees" for all purposes including FICA, FLSA, etc.

(ii) The determination of FTEs is to be based on the following records:

(A) To determine the number of employees, the employer's quarterly tax statement (or similar document) is to be used (assuming there is no issue as to whether all employees are listed on the tax statement); and

(B) To determine the number of hours of work by part-time employees, for purposes of aggregating such employees to FTEs, the last payroll (or the payrolls over the previous quarter, if the last payroll is not representative) is to be used, or where hours of work records are not maintained, other available information is to be used to make a reasonable approximation of hours of work (such as a standard work schedule). (But see paragraph (a)(2)(iii)(B)(1) of this section regarding the determination of FTEs for part-time employees without a computation of the hours worked by such employees.)

(iii) *The FTEs employed by the employer* means the total of the two numbers yielded by paragraphs (a)(2)(iii)(A) and (B), which follow:

(A) The number of full-time employees. A full-time employee is one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment). Each full-time employee equals one FTE (e.g., 50 full-time employees would yield 50 FTEs). (Note to paragraph (a)(2)(iii)(A): An employee who commonly works more than the number of hours constituting full-time employment cannot be counted as more than one FTE.); plus

(B) The part-time employees aggregated to a number of full-time equivalents, if the employer has part-time employees. For purposes of this determination, a part-time employee is one who regularly works fewer than the number of hours per week which constitutes full-time employment (e.g., employee regularly works 20 hours, where full-time employment is 35 hours per week). The aggregation of part-time employees to FTEs may be performed by

either of the following methods (i.e., paragraphs (a)(2)(iii)(B)(1) or (2)):

(1) Each employee working fewer than full-time hours counted as one-half of an FTE, with the total rounded to the next higher whole number (e.g., three employees working fewer than 35 hours per week, where full-time employment is 35 hours, would yield two FTEs (i.e., 1.5 rounded to 2)); or

(2) The total number of hours worked by all part-time employees in the representative pay period, divided by the number of hours per week that constitute full-time employment, with the quotient rounded to the nearest whole number (e.g., 72 total hours of work by three part-time employees, divided by 40 (hours per week constituting full-time employment), would yield two FTEs (i.e., 1.8 rounded to 2)).

(iv) *Examples of determinations of FTEs:* Employer A has 100 employees, 70 of whom are full-time (with full-time employment shown to be 44 hours of work per week) and 30 of whom are part-time (with a total of 1004 hours of work by all 30 part-time employees during the representative pay period). Utilizing the method in paragraph (a)(2)(iii)(B)(1) of this section, this employer would have 85 FTEs: 70 FTEs for full-time employees, plus 15 FTEs for part-time employees (i.e., each of the 30 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(1) of this section). (This employer would have 23 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 1004 total hours of work by part-time employees, divided by 44 (full-time employment), yielding 22.8, rounded to 23)). Employer B has 100 employees, 80 of whom are full-time (with full-time employment shown to be 40 hours of work per week) and 20 of whom are part-time (with a total of 630 hours of work by all 30 part-time employees during the representative pay period). This employer would have 90 FTEs: 80 FTEs for full-time employees, plus 10 FTEs for part-time employees (i.e., each of the 20 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(1) of this section) (This employer would have 16 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 630 total hours of work by part-time employees, divided by 40 (full-time employment), yielding 15.7, rounded to 16)).

(b) *What constitutes an "employer" for purposes of determining H-1B-dependency status?* Any group treated

as a single employer under the Internal Revenue Code (IRC) at 26 U.S.C. 414(b), (c), (m) or (o) shall be treated as a single employer for purposes of the determination of H-1B-dependency. Therefore, if an employer satisfies the requirements of the IRC and relevant regulations with respect to the following groups of employees, those employees will be treated as employees of a single employer for purposes of determining whether that employer is an H-1B-dependent employer.

(1) Pursuant to section 414(b) of the IRC and related regulations, all employees "within a controlled group of corporations" (within the meaning of section 1563(a) of the IRC, determined without regard to section 1563(a)(4) and (e)(3)(C)), will be treated as employees of a single employer. A *controlled group of corporations* is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a), 26 CFR 1.414(b)-1(a).

(i) A *parent-subsidiary-controlled group* is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.

(ii) A *brother-sister-controlled group* is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.

(iii) A *combined group* is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

(2) Pursuant to section 414(c) of the IRC and related regulations, all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employees of a single employer. 26 U.S.C. 414(c), 26 CFR 1.414(c)-2.

(i) Trades or businesses are under common control if they are included in:

(A) A parent-subsidiary group of trades or businesses;

(B) A brother-sister group of trades or businesses; or

(C) A combined group of trades or businesses.

(ii) Trades or businesses include sole proprietorships, partnerships, estates, trusts or corporations.

(ii) The standards for determining whether trades or businesses are under common control are similar to standards that apply to controlled groups of corporations. However, pursuant to 26 CFR 1.414(c)-2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

(3) Pursuant to section 414(m) of the IRC and related regulations, all employees of the members of an affiliated service group are treated as employees of a single employer. 26 U.S.C. 414(m).

(i) An *affiliated service group* is, generally, a group consisting of a service organization (the "first organization"), such as a health care organization, a law firm or an accounting firm, and one or more of the following:

(A) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons); or

(B) Any other organization if:

(1) A significant portion of the second organization's business is the performance of services for the first organization (or an organization described in paragraph (b)(3)(i) of this section or for both) of a type historically performed in such service field by employees, and

(2) Ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in paragraph (b)(3)(i) of this section).

(ii) [Reserved]

(4) Section 414(o) of the IRC provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision. Therefore, that section of the IRC will not be taken into account in determining what groups of employees are considered employees of a single employer for purposes of H-1B dependency determinations, unless regulations are issued by the Treasury Department during the period the dependency provisions of the ACWIA are effective.

(5) The definitions of "single employer" set forth in paragraphs (b)(1) through (b)(3) of this section are established by the Internal Revenue Service (IRS) in regulations located at 26 CFR 1.414(b)-1(a), (c)-2 and (m)-5. Guidance on these definitions should be sought from those regulations or from the IRS.

(c) *Which employers are required to make determinations of H-1B-dependency status?* Every employer that intends to file an LCA or to file H-1B petition(s) or request(s) for extension(s) of H-1B status between January 19, 2001 and October 1, 2003 is required to determine whether it is an H-1B-dependent employer or a willful violator which, except as provided in § 655.737, will be subject to the additional obligations for H-1B-dependent employers (see paragraph (g) of this section). During this time period, no H-1B-dependent employer or willful violator may use an LCA filed before January 19, 2001 to support a new H-1B petition or request for an extension of status. Furthermore, on all LCAs filed during this period an employer will be required to attest as to whether it is an H-1B-dependent employer or willful violator. An employer that attests that it is non-H-1B-dependent but does not meet the "snap shot" test set forth in paragraph (c)(2) of this section shall make and document a full calculation of its status. However, as explained in paragraphs (c)(1) and (2), which follow, most employers would not be required to make any calculations or to create any documentation as to the determination of H-1B status.

(1) *Employers with readily apparent status concerning H-1B-dependency need not calculate that status.* For most employers, regardless of their size, H-1B-dependency status (*i.e.*, H-1B-dependent or non-H-1B-dependent) is readily apparent and would require no calculations, in that the ratio of H-1B employees to the total workforce is obvious and can easily be compared to the definition of "H-1B-dependency" (see definition set out in paragraph (a)(1) of this section).

For example: Employer A with 20 employees, only one of whom is an H-1B non-immigrant, would obviously not be H-1B-dependent and would not need to make calculations to confirm that status. Employer B with 45 employees, 30 of whom are H-1B nonimmigrants, would obviously be H-1B-dependent and would not need to make calculations. Employer C with 500 employees, only 30 of whom are H-1B nonimmigrants, would obviously not be H-1B-dependent and would not need to make calculations. Employer D with

1,000 employees, 850 of whom are H-1B nonimmigrants, would obviously be H-1B-dependent and would not have to make calculations.

(2) *Employers with borderline H-1B-dependency status may use a "snap-shot" test to determine whether calculation of that status is necessary.* Where an employer's H-1B-dependency status (i.e., H-1B-dependent or non-H-1B-dependent) is not readily apparent, the employer may use one of the following tests to determine whether a full calculation of the status is needed:

(i) *Small employer* (50 or fewer employees). If the employer has 50 or fewer employees (both full-time and part-time, including H-1B nonimmigrants and U.S. workers), then the employer may compare the number of its H-1B nonimmigrant employees (both full-time and part-time) to the numbers specified in the definition set out in paragraph (a)(1) of this section, and shall fully calculate its H-1B-dependency status (i.e., calculate FTEs) where the number of its H-1B nonimmigrant employees is above the number specified in the definition. In other words, if the employer has 25 or fewer employees, and more than seven of them are H-1B nonimmigrants, then the employer shall fully calculate its status; if the employer has at least 26 but no more than 50 employees, and more than 12 of them are H-1B nonimmigrants, then the employer shall fully calculate its status.

(ii) *Large employer* (51 or more employees). If the number of H-1B nonimmigrant employees (both full-time and part-time), divided by the number of full-time employees (including H-1B nonimmigrants and U.S. workers), is 0.15 or more, then an employer which believes itself to be non-H-1B-dependent shall fully calculate its H-1B-dependency status (including the calculation of FTEs). In other words, if the number of full-time employees (including H-1B nonimmigrants and U.S. workers) multiplied by 0.15 yields a number that is equal to or less than the number of H-1B nonimmigrant employees (both full-time and part-time), then the employer shall attest that it is H-1B-dependent or shall fully calculate its H-1B dependency status (including the calculation of FTEs).

(d) *What documentation is the employer required to make or maintain, concerning its determination of H-1B-dependency status?* All employers are required to retain copies of H-1B petitions and requests for extensions of H-1B status filed with the INS, as well as the payroll records described in § 655.731(b)(1). The nature of any additional documentation would depend upon the general characteristics

of the employer's workforce, as described in paragraphs (d)(1) through (4), which follow.

(1) *Employer with readily apparent status concerning H-1B-dependency.* If an employer's H-1B-dependency status (i.e., H-1B-dependent or non-H-1B-dependent) is readily apparent (as described in paragraph (c)(1) of this section), then that status must be reflected on the employer's LCA but the employer is not required to make or maintain any particular documentation. The public access file maintained in accordance with § 655.760 would show the H-1B-dependency status, by means of copy(ies) of the LCA(s). In the event of an enforcement action pursuant to subpart I of this part, the employer's readily apparent status could be verified through records to be made available to the Administrator (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(2) *Employer with borderline H-1B-dependency status.* An employer which uses a "snap-shot" test to determine whether it should undertake a calculation of its H-1B-dependency status (as described in paragraph (c)(2) of this section) is not required to make or maintain any documentation of that "snap-shot" test. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the "snap-shot" test (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(3) *Employer with H-1B-dependent status.* An employer which attests that it is H-1B-dependent—whether that status is readily apparent or is determined through calculations—is not required to make or maintain any documentation of the calculation. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's designation of H-1B-dependent status on the LCA(s) would be conclusive and sufficient documentation of that status (except where the employer's status had altered to non-H-1B-dependent and had been appropriately documented, as described in paragraph (d)(5)(ii) of this section).

(4) *Employer with non-H-1B-dependent status who is required to perform full calculation.* An employer which attests that it is non-H-1B-dependent and does not meet the "snap-shot" test set forth in paragraph (c)(2) of this section shall retain in its records a

dated copy of its calculation that it is not H-1B-dependent. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(5) *Employer which changes its H-1B-dependency status due to changes in workforce.* An employer may experience a change in its H-1B-dependency status, due to changes in the ratio of H-1B nonimmigrant to U.S. workers in its workforce. Thus it is important that employers who wish to file a new LCA or a new H-1B petition or request for extension of status remain cognizant of their dependency status and do a recheck of such status if the make-up of their workforce changes sufficiently that their dependency status might possibly change. In the event of such a change of status, the following standards will apply:

(i) Change from non-H-1B-dependent to H-1B-dependent. An employer which experiences this change in its workforce is not required to make or maintain any record of its determination of the change of its H-1B-dependency status. The employer is not required to file new LCA(s) (which would accurately state its H-1B-dependent status), unless it seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section).

(ii) Change from H-1B-dependent to non-H-1B-dependent. An employer which experiences this change in its workforce is required to perform a full calculation of its status (as described in paragraph (c) of this section) and to retain a copy of such calculation in its records. If the employer seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section), the employer shall either file new LCAs reflecting its non-H-1B-dependent status or use its existing certified LCAs reflecting an H-1B-dependency status, in which case it shall continue to be bound by the dependent-employer attestations on such LCAs. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(6) *Change in corporate structure or identity of employer.* If an employer which experiences a change in its corporate structure as the result of an acquisition, merger, "spin-off," or other such action wishes to file a new LCA or a new H-1B petition or request for extension of status, the new employing entity shall redetermine its H-1B-dependency status in accordance with paragraphs (a) and (c) of this section (see paragraph (g) of this section). (See § 655.730(e), regarding change in corporate structure or identity of employer.) In the event of an enforcement action pursuant to subpart I of this part, the employer's calculations where required under paragraph (c) of this section and its records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(7) *"Single employer" under IRC test.* If an employer utilizes the IRC single-employer definition and concludes that it is non-H-1B-dependent, the employer shall perform the "snap-shot" test set forth in paragraph (c)(2) of this section, and if it fails to meet that test, shall attest that it is H-1B-dependent or shall perform the full calculation of dependency status in accordance with paragraph (a) of this section. The employer shall place a list of the entities included as a "single employer" in the public access file maintained in accordance with § 766.760. In addition, the employer shall retain in its records the "snap-shot" or full calculation of its status, as appropriate (showing the number of employees of each entity who are included in the numerator and denominator of the equation, whether the employer utilizes the "snap shot" test or a complete calculation as described in paragraph (c) of this section). In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(e) *How is an employer's H-1B-dependency status to be shown on the LCA?* The employer is required to designate its status by marking the appropriate box on the Form ETA-9035 (i.e., either H-1B-dependent or non-H-1B-dependent). An employer which marks the designation of "H-1B-dependent" may also mark the designation of its intention to seek only

"exempt" H-1B nonimmigrants on the LCA (see paragraph (g) of this section, and § 655.737). In the event that an employer has filed an LCA designating its H-1B-dependency status (either H-1B-dependent or non-H-1B-dependent) and thereafter experiences a change of status, the employer cannot use that LCA to support H-1B petitions for new nonimmigrants or requests for extension of H-1B status for existing nonimmigrants. Similarly, an employer that is or becomes H-1B-dependent cannot continue to use an LCA filed before January 19, 2001 to support new H-1B petitions or requests for extension of status. In such circumstances, the employer shall file a new LCA accurately designating its status and shall use that new LCA to support new petitions or requests for extensions of status.

(f) *What constitutes a "willful violator" employer and what are its special obligations?*

(1) *"Willful violator" or "willful violator employer,"* for purposes of this subpart H and subpart I of this part means an employer that meets all of the following standards (i.e., paragraphs (f)(1)(i) through (iii))—

(i) A finding of violation by the employer (as described in paragraph (f)(1)(ii)) is entered in either of the following two types of enforcement proceeding:

(A) A Department of Labor proceeding under section 212(n)(2) of the Act (8 U.S.C. 1182(n)(2)(C) and subpart I of this part; or

(B) A Department of Justice proceeding under section 212(n)(5) of the Act (8 U.S.C. 1182(n)(5)).

(ii) The agency finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and

(iii) The agency's finding is entered on or after October 21, 1998.

(2) For purposes of this paragraph, "willful failure" means a violation which is a "willful failure" as defined in § 655.805(c).

(g) *What LCAs are subject to the additional attestation obligations?*

(1) An employer that is "H-1B-dependent" (under the standards described in paragraphs (a) through (e) of this section) or is a "willful violator" (under the standards described in paragraph (f) of this section) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (under the standards described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in paragraph (2)(g) of this

section, to be used to support any petitions for new H-1B nonimmigrants or any requests for extensions of status for existing H-1B nonimmigrants. An LCA which does not accurately indicate the employer's H-1B-dependency status or willful violator status shall not be used to support H-1B petitions or requests for extensions. Further, an employer which falsely attests to non-H-1B-dependency status, or which experiences a change of status to H-1B-dependency but continues to use the LCA to support new H-1B petitions or requests for extension of status shall—despite the LCA designation of non-H-1B-dependency—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(2) During the period between January 19, 2001 and October 1, 2003, any employer that is "H-1B-dependent" (under the standards described in paragraphs (a) through (e) of this section) or is a "willful violator" (under the standards described in paragraph (f) of this section) shall file a new LCA accurately indicating that status in order to be able to file petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrant(s). An LCA filed prior to January 19, 2001 may not be used to support petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrants.

(3) An employer that files an LCA indicating "H-1B-dependent" and/or "willful violator" status may also indicate on the LCA that all the H-1B nonimmigrants to be employed pursuant to that LCA will be "exempt H-1B nonimmigrants" as described in § 655.737. Such an LCA is not subject to the additional LCA attestation obligations, *provided that* all H-1B nonimmigrants employed under it are, in fact, exempt. An LCA which indicates that it will be used only for exempt H-1B nonimmigrants shall not be used to support H-1B petitions or requests for extensions of status for H-1B nonimmigrants who are not, in fact, exempt. Further, an employer which attests that the LCA will be used only for exempt H-1B nonimmigrants but uses the LCA to employ non-exempt H-1B nonimmigrants (through petitions and/or extensions of status) shall—despite the LCA designation of exempt H-1B nonimmigrants—be held to its obligations to comply with the attestation requirements concerning

nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(4) The special provisions for H-1B-dependent employers and willful violator employers do not apply to LCAs filed after October 1, 2003 (see 8 U.S.C. 1182(n)(1)(E)(ii)). However, all LCAs filed prior to that date, and containing the additional attestation obligations described in this section and §§ 655.737 through 655.739, will remain in effect with regard to those obligations, for so long as any H-1B nonimmigrant(s) employed pursuant to the LCA(s) remain employed by the employer.

16. Section 655.737 is added to read as follows:

§ 655.737 What are “exempt” H-1B nonimmigrants, and how does their employment affect the additional attestation obligations of H-1B-dependent employers and willful violator employers?

(a) An employer that is H-1B-dependent or a willful violator of the H-1B program requirements (as described in § 655.736) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in § 655.736(g). However, these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of “exempt” H-1B nonimmigrants (through petitions and/or extensions of status) as described in this section.

(b) *What is the test or standard for determining an H-1B nonimmigrant’s “exempt” status?* An H-1B nonimmigrant is “exempt” for purposes of this section if the nonimmigrant meets either of the two following criteria:

(1) Receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000; or

(2) Has attained a master’s or higher degree (or its equivalent) in a specialty related to the intended employment.

(c) *How is the \$60,000 annual wage to be determined?* The H-1B nonimmigrant can be considered to be an “exempt” worker, for purposes of this section, if the nonimmigrant actually receives hourly wages or annual salary totaling at least \$60,000 in the calendar year. The standards applicable to the employer’s satisfaction of the required wage obligation are applicable to the determination of whether the \$60,000 wages or salary are

received (see § 655.731(c)(2) and (3)). Thus, employer contributions or costs for benefits such as health insurance, life insurance, and pension plans cannot be counted toward this \$60,000. The compensation to be counted or credited for these purposes could include cash bonuses and similar payments, *provided that* such compensation is paid to the worker “cash in hand, free and clear, when due” (§ 655.731(c)(1)), meaning that the compensation has readily determinable market value, is readily convertible to cash tender, and is actually received by the employee when due (which must be within the year for which the employer seeks to count or credit the compensation toward the employee’s \$60,000 earnings to qualify for exempt status). Cash bonuses and similar compensation can be counted or credited toward the \$60,000 for “exempt” status only if payment is assured (*i.e.*, if the payment is contingent or conditional on some event such as the employer’s annual profits, the employer must guarantee payment even if the contingency is not met). The full \$60,000 annual wages or salary must be received by the employee in order for the employee to have “exempt” status. The wages or salary required for “exempt” status cannot be decreased or *pro rated* based on the employee’s part-time work schedule; an H-1B nonimmigrant working part-time, whose actual annual compensation is less than \$60,000, would not qualify as exempt on the basis of wages, even if the worker’s earnings, if projected to a full-time work schedule, would theoretically exceed \$60,000 in a year. Where an employee works for less than a full year, the employee must receive at least the appropriate *pro rata* share of the \$60,000 in order to be “exempt” (*e.g.*, an employee who resigns after three months must be paid at least \$15,000). In the event of an investigation pursuant to subpart I of this part, the Administrator will determine whether the employee has received the required \$60,000 per year, using the employee’s anniversary date to determine the one-year period; for an employee who had worked for less than a full year (either at the beginning of employment, or after his/her last anniversary date), the determination as to the \$60,000 annual wages will be on a *pro rata* basis (*i.e.*, whether the employee had been paid at a rate of \$60,000 per year (or \$5,000 per month) including any unpaid, guaranteed bonuses or similar compensation).

(d) *How is the “master’s or higher degree (or its equivalent) in a specialty*

related to the intended employment” to be determined?

(1) “Master’s or higher degree (or its equivalent),” for purposes of this section means a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, and which is equivalent to a master’s or higher degree issued by a U.S. academic institution. The equivalence to a U.S. academic degree cannot be established through experience or through demonstration of expertise in the academic specialty (*i.e.*, no “time equivalency” or “performance equivalency” will be recognized as substituting for a degree issued by an academic institution). The INS and the Department will consult appropriate sources of expertise in making the determination of equivalency between foreign and U.S. academic degrees. Upon the request of the INS or the Department, the employer shall provide evidence to establish that the H-1B nonimmigrant has received the degree, that the degree was earned in the asserted field of study, including an academic transcript of courses, and that the institution from which the degree was obtained was accredited or recognized.

(2) “Specialty related to the intended employment,” for purposes of this section, means that the academic degree is in a specialty which is generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. A “specialty” which is not generally accepted as appropriate or necessary to the employment would not be considered to be sufficiently “related” to afford the H-1B nonimmigrant status as an “exempt H-1B nonimmigrant.”

(e) *When and how is the determination of the H-1B nonimmigrant’s “exempt” status to be made?* An employer that is H-1B-dependent or a willful violator (as described in § 655.736) may designate on the LCA that the LCA will be used only to support H-1B petition(s) and/or request(s) for extension of status for “exempt” H-1B nonimmigrants.

(1) If the employer makes the designation of “exempt” H-1B nonimmigrant(s) on the LCA, then the INS—as part of the adjudication of the H-1B petition or request for extension of status—will determine the worker’s “exempt” status, since an H-1B petition must be supported by an LCA consistent with the petition (*i.e.*, occupation, area of intended employment, exempt status). The employer shall maintain, in the public access file maintained in

accordance with § 755.760, a list of the H-1B nonimmigrant(s) whose petition(s) and/or request(s) are supported by LCA(s) which the employer has attested will be used only for exempt H-1B nonimmigrants. In the event of an investigation under subpart I of this part, the Administrator will give conclusive effect to an INS determination of "exempt" status based on the nonimmigrant's educational attainments (*i.e.*, master's or higher degree (or its equivalent) in a specialty related to the intended employment) unless the determination was based on false information. If the INS determination of "exempt" status was based on the assertion that the nonimmigrant would receive wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000, the employer shall provide evidence to show that such wages actually were received by the nonimmigrant (consistent with paragraph (c) of this section and the regulatory standards for satisfaction or payment of the required wages as described in § 655.731(c)(3)).

(2) If the employer makes the designation of "exempt" H-1B nonimmigrants on the LCA, but is found in an enforcement action under subpart I of this part to have used the LCA to employ nonimmigrants who are, in fact, not exempt, then the employer will be subject to a finding that it failed to comply with the nondisplacement and recruitment obligations (as described in §§ 655.738 and 655.739, respectively) and may be assessed appropriate penalties and remedies.

(3) If the employer does not make the designation of "exempt" H-1B nonimmigrants on the LCA, then the employer has waived the option of not being subject to the additional LCA attestation obligations on the basis of employing only exempt H-1B nonimmigrants under the LCA. In the event of an investigation under subpart I of this part, the Administrator will not consider the question of the nonimmigrant(s)'s "exempt" status in determining whether an H-1B-dependent employer or willful violator employer has complied with such additional LCA attestation obligations.

17. Section 655.738 is added to read as follows:

§ 655.738 What are the "non-displacement of U.S. workers" obligations that apply to H-1B-dependent employers and willful violators, and how do they operate?

An employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displacement of any

U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)—under the standards set out in this section.

(a) "*United States worker*" ("U.S. worker") is defined in § 655.715.

(b) "*Displacement*," for purposes of this section, has two components: "lay off" of U.S. worker(s), and "essentially equivalent jobs" held by U.S. worker(s) and H-1B nonimmigrant(s).

(1) "*Lay off*" of a U.S. worker means that the employer has caused the worker's loss of employment, other than through—

(i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker's performance or behavior on the job;

(ii) A U.S. worker's voluntary departure or voluntary retirement (to be assessed in light of the totality of the circumstances, under established principles concerning "constructive discharge" of workers who are pressured to leave employment);

(iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade the employer's non-displacement obligation. The question is whether the loss of the contract or grant has caused the worker's loss of employment. It would not be a layoff where the job loss results from the expiration of a grant or contract without which there is no alternative funding or need for the U.S. worker's position on that or any other grant or contract (*e.g.*, the expiration of a research grant that funded a project on which the worker was employed at an academic or research institution; the expiration of a staffing firm's contract with a customer where the U.S. worker was hired expressly to work pursuant to that contract and the employer has no practice of moving workers to other customers or projects upon the expiration of contract(s)). On the other hand, it would be a layoff where the employer's normal practice is to move the U.S. worker from one contract to another when a contract expires, and work on another contract for which the worker is qualified is available (*e.g.*, staffing firm's contract with one customer ends and another contract with a different customer begins); or

(iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at

equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(A) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. worker to refuse or an offer made with the expectation that the worker will refuse;

(B) The offered job provides the U.S. worker an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(C) The offered job provides the U.S. worker equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged. The comparison of compensation and benefits includes all forms of remuneration for employment, whether or not called wages and irrespective of the time of payment (*e.g.*, salary or hourly wage rate; profit sharing; retirement plan; expense account; use of company car). The comparison also includes such matters as cost of living differentials and relocation expenses (*e.g.*, a New York City "opportunity" at equivalent or higher compensation and benefits offered to a worker discharged from a job in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs).

(2) *Essentially equivalent jobs.* For purposes of the displacement prohibition, the job from which the U.S. worker is laid off must be essentially equivalent to the job for which an H-1B nonimmigrant is sought. To determine whether the jobs of the laid off U.S. worker(s) and the H-1B nonimmigrant(s) are essentially equivalent, the comparison(s) shall be on a one-to-one basis where appropriate (*i.e.*, one U.S. worker left employment and one H-1B nonimmigrant joined the workforce) but shall be broader in focus where appropriate (*e.g.*, an employer, through reorganization, eliminates an entire department with several U.S. workers and then staffs this department's function(s) with H-1B nonimmigrants). The following comparisons are to be made:

(i) Job responsibilities. The job of the H-1B nonimmigrant must involve essentially the same duties and responsibilities as the job from which the U.S. worker was laid off. The

comparison focuses on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in this comparison. The job responsibilities must be similar and both workers capable of performing those duties.

(ii) Qualifications and experience of the workers. The qualifications of the laid off U.S. worker must be substantially equivalent to the qualifications of the H-1B nonimmigrant. The comparison is to be confined to the experience and qualifications (e.g., training, education, ability) of the workers which are directly relevant to the actual performance requirements of the job, including the experience and qualifications that would materially affect a worker's relative ability to perform the job better or more efficiently. While it would be appropriate to compare whether the workers in question have "substantially equivalent" qualifications and experience, the workers need not have identical qualifications and experience (e.g., a bachelor's degree from one accredited university would be considered to be substantially equivalent to a bachelor's degree from another accredited university; 15 years experience in an occupation would be substantially equivalent to 10 years experience in that occupation). It would not be appropriate to compare the workers' relative ages, their sexes, or their ethnic or religious identities.

(iii) Area of employment. The job of the H-1B nonimmigrant must be located in the same area of employment as the job from which the U.S. worker was laid off. The comparison of the locations of the jobs is confined to the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. For purposes of this comparison, if both such worksites or locations are within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area, they will be deemed to be within the same area of employment.

(3) The worker's rights under a collective bargaining agreement or other employment contract are not affected by the employer's LCA obligations as to non-displacement of such worker.

(c) *Direct displacement.* An H-1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from displacing a U.S. worker in its own

workforce (i.e., a U.S. worker "employed by the employer") within the period beginning 90 days before and ending 90 days after the filing date of an H-1B petition supported by an LCA described in § 655.736(g). The following standards and guidance apply under the direct displacement prohibition:

(1) *Which U.S. workers are protected against "direct displacement"?* This prohibition covers the H-1B employer's own workforce—U.S. workers "employed by the employer"—who are employed in jobs that are essentially equivalent to the jobs for which the H-1B nonimmigrant(s) are sought (as described in paragraph (b)(2) of this section). The term "employed by the employer" is defined in § 655.715.

(2) *When does the "direct displacement" prohibition apply?* The H-1B employer is prohibited from displacing a U.S. worker during a specific period of time before and after the date on which the employer files any H-1B petition supported by the LCA which is subject to the non-displacement obligation (as described in § 655.736(g)). This protected period is from 90 days before until 90 days after the petition filing date.

(3) *What constitutes displacement of U.S. worker?* The H-1B employer is prohibited from laying off a U.S. worker from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought (as described in paragraph (b)(1) of this section).

(d) *Secondary displacement.* An H-1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from placing certain H-1B nonimmigrant(s) with another employer where there are indicia of an employment relationship between the nonimmigrant and that other employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the H-1B employer makes certain inquiries and/or has certain information concerning that other employer's displacement of similarly employed U.S. workers in its workforce. Employers are cautioned that even if the required inquiry of the secondary employer is made, the H-1B-dependent or willful violator employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) during the applicable time period (see § 655.810(d)). The following standards and guidance apply under the secondary displacement prohibition:

(1) *Which U.S. workers are protected against "secondary displacement"?* This provision applies to U.S. workers employed by the other or "secondary"

employer (not those employed by the H-1B employer) in jobs that are essentially equivalent to the jobs for which certain H-1B nonimmigrants are placed with the other/secondary employer (as described in paragraph (b)(2) of this section). The term "employed by the employer" is defined in § 655.715.

(2) *Which H-1B nonimmigrants activate the secondary displacement prohibition?* Not every placement of an H-1B nonimmigrant with another employer will activate the prohibition and—depending upon the particular facts—an H-1B employer (such as a service provider) may be able to place H-1B nonimmigrant(s) at a client or customer's worksite without being subject to the prohibition. The prohibition applies to the placement of an H-1B nonimmigrant whose H-1B petition is supported by an LCA described in § 655.736(g) and whose placement with the other/secondary employer meets both of the following criteria:

(i) The nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by the other/secondary employer; and

(ii) There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H-1B-nonimmigrant and the other/secondary need not constitute an "employment" relationship (as defined in § 655.715), and the applicability of the secondary displacement provision does not establish such a relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

(3) *What other/secondary employers are included in the prohibition on secondary displacement of U.S. workers by the H-1B employer?* The other/secondary employer who accepts the placement and/or services of the H-1B employer's nonimmigrant employee(s) need not be an H-1B employer. The other/secondary employer would often be (but is not limited to) the client or customer of an H-1B employer that is a staffing firm or a service provider which offers the services of H-1B

nonimmigrants under a contract (e.g., a medical staffing firm under contract with a nursing home provides H-1B nonimmigrant physical therapists; an information technology staffing firm under contract with a bank provides H-1B nonimmigrant computer engineers). Only the H-1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period. The other/secondary employer will not be subject to sanctions in an enforcement action pursuant to subpart I of this part (except in circumstances where such other/secondary employer is, in fact, an H-1B employer and is found to have failed to comply with its own obligations). (Note to paragraph (d)(3): Where the other/secondary employer's relationship to the H-1B nonimmigrant constitutes "employment" for purposes of a statute other than the H-1B provision of the INA, such as the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), the other/secondary employer would be subject to all obligations of an employer of the nonimmigrant under such other statute.)

(4) *When does the "secondary displacement" prohibition apply?* The H-1B employer's obligation of inquiry concerns the actions of the other/secondary employer during the specific period beginning 90 days before and ending 90 days after the date of the placement of the H-1B nonimmigrant(s) with such other/secondary employer.

(5) *What are the H-1B employer's obligations concerning inquiry and/or information as to the other/secondary employer's displacement of U.S. workers?* The H-1B employer is prohibited from placing the H-1B nonimmigrant with another employer, unless the H-1B employer has inquired of the other/secondary employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of such placement, the other/secondary employer has displaced or intends to displace a similarly-employed U.S. worker employed by such other/secondary employer. The following standards and guidance apply to the H-1B employer's obligation:

(i) The H-1B employer is required to exercise due diligence and to make a reasonable effort to enquire about potential secondary displacement, through methods which may include (but are not limited to)—

(A) Securing and retaining a written assurance from the other/secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period;

(B) Preparing and retaining a memorandum to the file, prepared at the same time or promptly after receiving the other/secondary employer's oral statement that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period (such memorandum shall include the substance of the conversation, the date of the communication, and the names of the individuals who participated in the conversation, including the person(s) who made the inquiry on behalf of the H-1B employer and made the statement on behalf of the other/secondary employer); or

(C) Including a secondary displacement clause in the contract between the H-1B employer and the other/secondary employer, whereby the other/secondary employer would agree that it has not and will not displace similarly-employed U.S. workers within the prescribed period.

(ii) The employer's exercise of due diligence may require further, more particularized inquiry of the other/secondary employer in circumstances where there is information which indicates that U.S. worker(s) have been or will be displaced (e.g., where the H-1B nonimmigrants will be performing functions that the other/secondary employer performed with its own workforce in the past). The employer is not permitted to disregard information which would provide knowledge about

potential secondary displacement (e.g., newspaper reports of relevant lay-offs by the other/secondary employer) if such information becomes available before the H-1B employer's placement of H-1B nonimmigrants with such employer. Under such circumstances, the H-1B employer would be expected to recontact the other/secondary employer and receive credible assurances that no lay-offs of similarly-employed U.S. workers are planned or have occurred within the prescribed period.

(e) *What documentation is required of H-1B employers concerning the non-displacement obligation?* The H-1B employer is responsible for demonstrating its compliance with the non-displacement obligation (whether direct or indirect), if applicable.

(1) Concerning *direct displacement* (as described in paragraph (c) of this section), the employer is required to retain all records the employer creates or receives concerning the circumstances under which each U.S. worker, in the same locality and same occupation as any H-1B nonimmigrant(s) hired, left its employ in the period from 90 days before to 90 days after the filing date of the employer's petition for the H-1B nonimmigrant(s), and for any such U.S. worker(s) for whom the employer has taken any action during the period from 90 days before to 90 days after the filing date of the H-1B petition to cause the U.S. worker's termination (e.g., a notice of future termination of the employee's job). For all such employees, the H-1B employer shall retain at least the following documents: the employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience and qualifications, and principal assignments; all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the employer or the employee and any responses thereto, and evaluations of the employee's job performance. Finally, the employer is required to maintain a record of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto.

(2) Concerning *secondary displacement* (as described in paragraph (d) of this section), the H-1B employer is required to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H-1B employer places any H-1B

nonimmigrants (as described in paragraph (d)(5) of this section).

18. Section 655.739 is added to read as follows:

§ 655.739 What is the “recruitment of U.S. workers” obligation that applies to H-1B-dependent employers and willful violators, and how does it operate?

An employer that is subject to this additional attestation obligation (under the standards described in § 655.736) is required—prior to filing the LCA or any petition or request for extension of status supported by the LCA—to take good faith steps to recruit U. S. workers in the United States for the job(s) in the United States for which the H-1B nonimmigrant(s) is/are sought. The recruitment shall use procedures that meet industry-wide standards and offer compensation that is at least as great as the required wage to be paid to H-1B nonimmigrants pursuant to § 655.731(a) (*i.e.*, the higher of the local prevailing wage or the employer's actual wage). The employer may use legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner. This section provides guidance for the employer's compliance with the recruitment obligation.

(a) “*United States worker*” (“U.S. worker”) is defined in § 655.715.

(b) “*Industry*,” for purposes of this section, means the set of employers which primarily compete for the same types of workers as those who are the subjects of the H-1B petitions to be filed pursuant to the LCA. Thus, a hospital, university, or computer software development firm is to use the recruitment standards utilized by the health care, academic, or information technology industries, respectively, in hiring workers in the occupations in question. Similarly, a staffing firm, which places its workers at job sites of other employers, is to use the recruitment standards of the industry which primarily employs such workers (*e.g.*, the health care industry, if the staffing firm is placing physical therapists (whether in hospitals, nursing homes, or private homes); the information technology industry, if the staffing firm is placing computer programmers, software engineers, or other such workers).

(c) “*Recruitment*,” for purposes of this section, means the process by which an employer seeks to contact or to attract the attention of person(s) who may apply for employment, solicits applications from person(s) for employment, receives applications, and reviews and considers applications so as

to present the appropriate candidates to the official(s) who make(s) the hiring decision(s) (*i.e.*, pre-selection treatment of applications and applicants).

(d) “*Solicitation methods*,” for purposes of this section, means the techniques by which an employer seeks to contact or to attract the attention of potential applicants for employment, and to solicit applications from person(s) for employment.

(1) Solicitation methods may be either external or internal to the employer's workforce (with internal solicitation to include current and former employees).

(2) Solicitation methods may be either active (where an employer takes positive, proactive steps to identify potential applicants and to get information about its job openings into the hands of such person(s)) or passive (where potential applicants find their way to an employer's job announcements).

(i) Active solicitation methods include direct communication to incumbent workers in the employer's operation and to workers previously employed in the employer's operation and elsewhere in the industry; providing training to incumbent workers in the employer's organization; contact and outreach through collective bargaining organizations, trade associations and professional associations; participation in job fairs (including at minority-serving institutions, community/junior colleges, and vocational/technical colleges); use of placement services of colleges, universities, community/junior colleges, and business/trade schools; use of public and/or private employment agencies, referral agencies, or recruitment agencies (“headhunters”).

(ii) Passive solicitation methods include advertising in general distribution publications, trade or professional journals, or special interest publications (*e.g.*, student-oriented; targeted to underrepresented groups, including minorities, persons with disabilities, and residents of rural areas); America's Job Bank or other Internet sites advertising job vacancies; notices at the employer's worksite(s) and/or on the employer's Internet “home page.”

(e) How are “*industry-wide standards for recruitment*” to be identified? An employer is not required to utilize any particular number or type of recruitment methods, and may make a determination of the standards for the industry through methods such as trade organization surveys, studies by consultative groups, or reports/statements from trade organizations. An employer which makes such a determination should be prepared to

demonstrate the industry-wide standards in the event of an enforcement action pursuant to subpart I of this part. An employer's recruitment shall be at a level and through methods and media which are normal, common or prevailing in the industry, including those strategies that have been shown to be successfully used by employers in the industry to recruit U.S. workers. An employer may not utilize only the lowest common denominator of recruitment methods used in the industry, or only methods which could reasonably be expected to be likely to yield few or no U.S. worker applicants, even if such unsuccessful recruitment methods are commonly used by employers in the industry. An employer's recruitment methods shall include, at a minimum, the following:

(1) Both internal and external recruitment (*i.e.*, both within the employer's workforce (former as well as current workers) and among U.S. workers elsewhere in the economy); and

(2) At least some active recruitment, whether internal (*e.g.*, training the employer's U.S. worker(s) for the position(s)) or external (*e.g.*, use of recruitment agencies or college placement services).

(f) How are “*legitimate selection criteria relevant to the job that are normal or customary to the type of job involved*” to be identified? In conducting recruitment of U.S. workers (*i.e.*, in soliciting applications and in pre-selection screening or considering of applicants), an employer shall apply selection criteria which satisfy all of the following three standards (*i.e.*, paragraph (b) (1) through (3)). Under these standards, an employer would not apply spurious criteria that discriminate against U.S. worker applicants in favor of H-1B nonimmigrants. An employer that uses criteria which fail to meet these standards would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(1) *Legitimate criteria*, meaning criteria which are legally cognizable and not violative of any applicable laws (*e.g.*, employer may not use age, sex, race or national origin as selection criteria);

(2) *Relevant to the job*, meaning criteria which have a nexus to the job's duties and responsibilities; and

(3) *Normal and customary to the type of job involved*, meaning criteria which would be necessary or appropriate based on the practices and expectations of the industry, rather than on the preferences of the particular employer.

(g) What actions would constitute a prohibited “*discriminatory manner*” of recruitment? The employer shall not

apply otherwise-legitimate screening criteria in a manner which would skew the recruitment process in favor of H-1B nonimmigrants. In other words, the employer's application of its screening criteria shall provide full and fair solicitation and consideration of U.S. applicants. The recruitment would be considered to be conducted in a discriminatory manner if the employer applied its screening criteria in a disparate manner (whether between H-1B and U.S. workers, or between jobs where H-1B nonimmigrants are involved and jobs where such workers are not involved). The employer would also be considered to be recruiting in a discriminatory manner if it used screening criteria that are prohibited by any applicable discrimination law (e.g., sex, race, age, national origin). The employer that conducts recruitment in a discriminatory manner would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(h) *What constitute "good faith steps" in recruitment of U.S. workers?* The employer shall perform its recruitment, as described in paragraphs (d) through (g) of this section, so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process against U.S. workers or in favor of H-1B nonimmigrants. No specific regimen is required for solicitation methods seeking applicants or for pre-selection treatment screening applicants. The employer's recruitment process, including pre-selection treatment, must assure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through a process that serves the employer's preferences with respect to the make up of its workforce (e.g., the Department would look with disfavor on a practice of interviewing H-1B applicants but not U.S. applicants, or a practice of screening the applications of H-1B nonimmigrants differently from the applications of U.S. workers). The employer shall not exercise a preference for its incumbent nonimmigrant workers who do not yet have H-1B status (e.g., workers on student visas). The employer shall recruit in the United States, seeking U.S. worker(s), for the job(s) in the United States for which H-1B nonimmigrant(s) are or will be sought.

(i) What documentation is the employer required to make or maintain, concerning its recruitment of U.S. workers?

(1) The employer shall maintain documentation of the recruiting methods used, including the places and dates of the advertisements and postings

or other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). The documentation may be in any form, including copies of advertisements or proofs from the publisher, the order or confirmation from the publisher, an electronic or printed copy of the Internet posting, or a memorandum to the file.

(2) The employer shall retain any documentation it has received or prepared concerning the treatment of applicants, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, and records of job offers and applicants' responses. To comply with this requirement, the employer is not required to create any documentation it would not otherwise create.

(3) The documentation maintained by the employer shall be made available to the Administrator in the event of an enforcement action pursuant to subpart I of this part. The documentation shall be maintained for the period of time specified in § 655.760.

(4) The employer's public access file maintained in accordance with § 655.760 shall contain information summarizing the principal recruitment methods used and the time frame(s) in which such recruitment methods were used. This may be accomplished either through a memorandum or through copies of pertinent documents.

(j) In addition to conducting good faith recruitment of U.S. workers (as described in paragraphs (a) through (h) of this section), the employer is required to have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B nonimmigrant (see 8 U.S.C. 1182(n)(1)(G)(i)(II)); this requirement is enforced by the Department of Justice (see 8 U.S.C. 1182(n)(5); 20 CFR 655.705(c)).

19. Section 655.740 is amended by revising the title and paragraph (a)(2)(ii) to read as follows:

§ 655.740 What actions are taken on labor condition applications?

(a) * * *

(2) * * *

(ii) When the Form ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—e.g., where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been

disqualified from employing H-1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

* * * * *

20. Section 655.750 is amended by revising the title and paragraph (b)(2) to read as follows:

§ 655.750 What is the validity period of the labor condition application?

* * * * *

(b) * * *

(2) Requests for withdrawals shall be in writing and shall be directed to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

* * * * *

21. Section 655.760 is amended by revising the title and paragraph (a)(1), adding paragraphs (a)(6), (a)(7), (a)(8), (a)(9) and (a)(10), and revising the first sentence of paragraph (c), to read as follows:

§ 655.760 What records are to be made available to the public, and what records are to be retained?

(a) * * *

(1) A copy of the completed labor condition application, Form ETA 9035, and cover pages, Form ETA 9035CP. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer.

* * * * *

(6) A summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits (such summary need not include proprietary information such as the costs of the benefits to the employer, or the details of stock options or incentive distributions), and/or, where applicable, a statement that some/all H-1B nonimmigrants are receiving "home country" benefits (see § 655.731(c)(3));

(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the

new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity (*see* § 655.730(e)(1)).

(8) Where the employer utilizes the definition of "single employer" in the IRC, a list of any entities included as part of the single employer in making the determination as to its H-1B-dependency status (*see* § 655.736(d)(7));

(9) Where the employer is H-1B-dependent and/or a willful violator, and indicates on the LCA(s) that only "exempt" H-1B nonimmigrants will be employed, a list of such "exempt" H-1B nonimmigrants (*see* § 655.737(e)(1));

(10) Where the employer is H-1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information) (*see* § 655.739(i)(4)).

* * * * *

(c) *Retention of records.* Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.* * *

* * * * *

Subpart I—Enforcement of H-1B Labor Condition Applications

22. Section 655.800 is revised to read as follows:

§ 655.800 Who will enforce the LCAs and how will they be enforced?

(a) *Authority of Administrator.* Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and this subpart I and subpart H of this part.

(b) *Conduct of investigations.* The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the

Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart I or subpart H of this part.

23. Section 655.801 is added to read as follows:

§ 655.801 What protection do employees have from retaliation?

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has—

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part and any pertinent regulations of INS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

(b) It shall be a violation of this section for any employer to engage in the conduct described in paragraph (a) of this section. Such conduct shall be subject to the penalties prescribed by section 212(n)(2)(C)(ii) of the INA and § 655.810(b)(2), *i.e.*, a fine of up to \$5,000, disqualification from filing petitions under section 204 or section 214(c) of the INA for at least two years, and such further administrative remedies as the Administrator considers appropriate.

(c) Pursuant to section 212(n)(2)(v) of the INA, an H-1B nonimmigrant who has filed a complaint alleging that an employer has discriminated against the employee in violation of paragraph (d)(1) of this section (or § 655.501(a)) may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. Such employment may not exceed the maximum period of stay authorized for a nonimmigrant classified under section 212(n) of the INA. Further information concerning this provision should be sought from the Immigration and Naturalization Service.

24. Section 655.805 is revised to read as follows:

§ 655.805 What violations may the Administrator investigate?

(a) The Administrator, through investigation, shall determine whether an H-1B employer has—

(1) Filed a labor condition application with ETA which misrepresents a material fact (Note to paragraph (a)(1): Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);

(3) Failed to provide working conditions as required under § 655.732;

(4) Filed a labor condition application for H-1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;

(5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;

(6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under

which the H-1B nonimmigrant(s) will be employed;

(7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B worker is placed), as prohibited by § 655.738 (if applicable);

(8) Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);

(9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

(10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section, or willful misrepresentation of a material fact on a labor condition application;

(11) Required or accepted from an H-1B nonimmigrant payment or remittance of the additional \$500/\$1,000 fee incurred in filing an H-1B petition with the INS, as prohibited by § 655.731(c)(10)(ii);

(12) Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);

(13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;

(14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);

(15) Failed to maintain documentation, as required by this part; and

(16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.

(b) The determination letter setting forth the investigation findings (see § 655.815) shall specify if the violations were found to be substantial or willful. Penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(5), (6), or (9) of this section only if the violation was found to be substantial or willful. The penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(2) or (3) of this section only if the violation was found to be willful, but the Secretary may order payment of back wages (including benefits) due for such violation whether or not the violation was willful.

(c) For purposes of this part, "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732. See

McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified, pursuant to §§ 655.740(a)(1) and 655.750, whether or not the employer hires any H-1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. If the period of employment specified in the labor condition application expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

25. Section 655.806 is added to read as follows:

§ 655.806 Who may file a complaint and how is it processed?

(a) Any aggrieved party, as defined in § 655.715, may file a complaint alleging a violation described in § 655.805(a). The procedures for filing a complaint by an aggrieved party and its processing by the Administrator are set forth in this section. The procedures for filing and processing information alleging violations from persons or organizations that are not aggrieved parties are set forth in § 655.807. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in § 655.805 has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be

accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories, and on the Department's informational site on the Internet at <http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm>. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(b) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815, issue a written determination as described in § 655.805(a).

26. Section 655.807 is added to read as follows:

§ 655.807 How may someone who is not an “aggrieved party” allege violations, and how will those allegations be processed?

(a) Persons who are not aggrieved parties may submit information concerning possible violations of the provisions described in § 655.805(a)(1) through (4) and (a)(7) through (9). No particular form is required to submit the information, except that the information shall be submitted in writing or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the information. An optional form shall be available to be used in setting forth the information. The information provided shall include:

(1) The identity of the person submitting the information and the person's relationship, if any, to the employer or other information concerning the person's basis for having knowledge of the employer's employment practices or its compliance with the requirements of this subpart I and subpart H of this part; and

(2) A description of the possible violation, including a description of the facts known to the person submitting the information, in sufficient detail for the Secretary to determine if there is reasonable cause to believe that the employer has committed a willful violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9).

(b) The Administrator may interview the person submitting the information as appropriate to obtain further information to determine whether the requirements of this section are met. In addition, the person submitting information under this section shall be informed that his or her identity will not be disclosed to the employer without his or her permission.

(c) Information concerning possible violations must be submitted not later than 12 months after the latest date on which the alleged violation(s) were committed. The 12-month period shall be applied in the manner described in § 655.806(a)(5).

(d) Upon receipt of the information, the Administrator shall promptly review the information submitted and determine:

(1) Does the source likely possess knowledge of the employer's practices or employment conditions or the employer's compliance with the requirements of subpart H of this part?

(2) Has the source provided specific credible information alleging a violation of the requirements of the conditions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9)?

(3) Does the information in support of the allegations appear to provide

reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9), and that

(i) The alleged violation is willful?

(ii) The employer has engaged in a pattern or practice of violations? or

(iii) The employer has committed substantial violations, affecting multiple employees?

(e) “Information” within the meaning of this section does not include information from an officer or employee of the Department of Labor unless it was obtained in the course of a lawful investigation, and does not include information submitted by the employer to the Attorney General or the Secretary in securing the employment of an H-1B nonimmigrant.

(f)(1) Except as provided in paragraph (f)(2) of this section, where the Administrator has received information from a source other than an aggrieved party which satisfies all of the requirements of paragraphs (a) through (d) of this section, or where the Administrator or another agency of the Department obtains such information in a lawful investigation under this or any other section of the INA or any other Act, the Administrator (by mail or facsimile transmission) shall promptly notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond, and request that the employer respond to the allegation within 10 days of its receipt of the notification. The Administrator shall not identify the source or information which would reveal the identity of the source without his or her permission.

(2) The Administrator may dispense with notification to the employer of the alleged violations if the Administrator determines that such notification might interfere with an effort to secure the employer's compliance. This determination shall not be subject to review in any administrative proceeding and shall not be subject to judicial review.

(g) After receipt of any response to the allegations provided by the employer, the Administrator will promptly review all of the information received and determine whether the allegations should be referred to the Secretary for a determination whether an investigation should be commenced by the Administrator.

(h) If the Administrator refers the allegations to the Secretary, the Secretary shall make a determination as to whether to authorize an investigation under this section.

(1) No investigation shall be commenced unless the Secretary (or the Deputy Secretary or other Acting Secretary in the absence or disability) personally authorizes the investigation and certifies—

(i) That the information provided under paragraph (a) of this section or obtained pursuant to a lawful investigation by the Department of Labor provides reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9);

(ii) That there is reasonable cause to believe the alleged violations are willful, that the employer has engaged in a pattern or practice of such violations, or that the employer has committed substantial violations, affecting multiple employees; and

(iii) That the other requirements of paragraphs (a) through (d) of this section have been met.

(2) No hearing shall be available from a decision by the Administrator declining to refer allegations addressed by this section to the Secretary, and none shall be available from a decision by the Secretary certifying or declining to certify that an investigation is warranted.

(i) If the Secretary issues a certification, an investigation shall be conducted and a determination issued within 30 days after the certification is received by the local Wage and Hour office undertaking the investigation. The time for the investigation may be increased upon the agreement of the employer and the Administrator or, if for reasons outside of the control of the Administrator, additional time is necessary to obtain information needed from the employer or other sources to determine whether a violation has occurred.

(j) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(k) Following the investigation, the Administrator shall issue a determination in accordance with to § 655.815.

(l) This section shall expire on September 30, 2003 unless section

212(n)(2)(G) of the INA is extended by future legislative action. Absent such extension, no investigation shall be certified by the Secretary under this section after that date; however, any investigation certified on or before September 30, 2003 may be completed.

27. Section 655.808 is added to read as follows:

§ 655.808 Under what circumstances may random investigations be conducted?

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning with the date of any of the following findings, provided such date is on or after October 21, 1998:

(1) A finding by the Secretary that the employer willfully violated any of the provisions described in § 655.805(a)(1) through (9);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application filed pursuant to § 655.730; or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) A finding within the meaning of this section is a final, unappealed decision of the agency. See §§ 655.520(a), 655.845(c), and 655.855(b).

(c) An investigation pursuant to this section may be made at any time the Administrator, in the exercise of discretion, considers appropriate, without regard to whether the Administrator has reason to believe a violation of the provisions of this subpart I and subpart H of this part has been committed. Following an investigation, the Administrator shall issue a determination in accordance with § 655.815.

28. Section 655.810 is revised to read as follows:

§ 655.810 What remedies may be ordered if violations are found?

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

(b) *Civil money penalties.* The Administrator may assess civil money penalties for violations as follows:

(1) An amount not to exceed \$1,000 per violation for:

(i) A violation pertaining to strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738);

(ii) A substantial violation pertaining to notification (§ 655.734), labor condition application specificity (§ 655.730), or recruitment of U.S. workers (§ 655.739);

(iii) A misrepresentation of material fact on the labor condition application;

(iv) An early-termination penalty paid by the employee (§ 655.731(c)(10)(i));

(v) Payment by the employee of the additional \$500/\$1,000 filing fee (§ 655.731(c)(10)(ii)); or

(vi) Violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of section 212(n) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of section 212(n) of the INA;

(2) An amount not to exceed \$5,000 per violation for:

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H-1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment;

(ii) A willful misrepresentation of a material fact on the labor condition application; or

(iii) Discrimination against an employee (§ 655.801(a)); or

(3) An amount not to exceed \$35,000 per violation where an employer (whether or not the employer is an H-1B-dependent employer or willful violator) displaced a U.S. worker employed by the employer in the period beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with any of the following violations:

(i) A willful violation of any of the provisions described in § 655.805(a)(2) through (9) pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(ii) A willful misrepresentation of a material fact on the labor condition application (§ 655.805(a)(1)).

(c) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of

violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) and this subparts H and I of this part;

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(d) *Disqualification from approval of petitions.* The Administrator shall notify the Attorney General pursuant to § 655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:

(1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) through (iii) of this section;

(2) At least two years for violation(s) of any of the provisions specified in paragraph (b)(2) of this section; or

(3) At least three years, for violation(s) specified in paragraph (b)(3) of this section.

(e) *Other administrative remedies.* (1) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(iv) or (v) of this section, the Administrator may issue an order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of those provisions.

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of § 655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these

provisions, or other appropriate legal or equitable remedies.

(f) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

(g) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

29. Section 655.815 is amended by revising the title and paragraphs (a) and (c)(5) to read as follows:

§ 655.815 What are the requirements for the Administrator's determination?

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

* * * * *

(c) * * *

(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the

Attorney General of the occurrence of a violation by the employer.

30. Section 655.820 is amended by revising the title and paragraph (a) to read as follows:

§ 655.820 How is a hearing requested?

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

* * * * *

31. The title of § 655.825 is revised to read as follows:

§ 655.825 What rules of practice apply to the hearing?

* * * * *

32. The title of § 655.830 is revised to read as follows:

§ 655.830 What rules apply to service of pleadings?

* * * * *

33. The title of § 655.835 is revised to read as follows:

§ 655.835 How will the administrative law judge conduct the proceeding?

* * * * *

34. Section 655.840 is amended by revising the title and paragraph (c) to read as follows:

§ 655.840 What are the requirements for a decision and order of the administrative law judge?

* * * * *

(c) In the event that the Administrator's determination of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to § 655.731(d)) and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § 655.731(d)), the administrative law judge shall remand the matter to the Administrator for further proceedings on the existence of wage violations and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in

the event either the employer or another interested party filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. See § 655.731; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination.

* * * * *

35. Section 655.845 is revised to read as follows:

§ 655.845 What rules apply to appeal of the decision of the administrative law judge?

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that

it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S-4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.830(b).

(h) The Board's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Board's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.850.

36. The title of § 655.850 is revised to read as follows:

§ 655.850 Who has custody of the administrative record?

* * * * *

37. Section 655.855 is revised to read as follows:

§ 655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?

(a) The Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring that the Attorney General not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. Violations requiring notification to the

Attorney General are identified in § 655.810(f).

(b) The Administrator shall notify the Attorney General and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board) pursuant to § 655.845; or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to § 655.845(c), or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision pursuant to § 655.845, holding that a violation was committed by an employer.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for nonimmigrants to be employed by the employer, for the period of time provided by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under this subpart I and subpart H of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for the same calendar period as specified by the Attorney General.

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub.L. 101-649, 109 Stat. 4978.

2. Section 656.3 is amended by removing the definition of *Federal research agency*.

3. Section 656.40 is amended by revising paragraphs (a)(1) and (c), and the introductory text to paragraph (b), by redesignating paragraph (d) as (e), and by adding a new paragraph (d) as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) * * *

(1) Except as provided in paragraphs (c) and (d) of this section, if the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

* * * * *

(b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean:

* * * * *

(c) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education, or a related or affiliated nonprofit entity; a nonprofit research organization; or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(1) The organizations listed in this paragraph (c) are defined as follows:

(i) *Institution of higher education* is defined in section 101(a) of the Higher Education Act of 1965. Section 101(a), 20 U.S.C. 1001(a) (1999), provides that an "institution of higher education" is an educational institution in any State that—

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such State to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a

bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

(iii) *Nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or

promotion of basic and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

(2) *A nonprofit organization or entity* within the meaning of this paragraph is one that is qualified as a tax exempt organization under Section 501(c)(3), (c)(4) or (c)(6) of the Internal Revenue Code of 1986, 26 U.S.C. 510(c)(3), (c)(4) or (c)(6), and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(d) With respect to a *professional athlete* as defined in section 212(a)(5)(A)(iii)(II) of the Immigration

and Nationality Act, when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered the prevailing wage. Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines a professional athlete as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

* * * * *

Signed at Washington, DC, this 11th day of December, 2000.

Raymond Bramucci,

Assistant Secretary, Employment and Training Administration.

T. Michael Kerr,

Administrator, Wage and Hour Division, Employment Standards Administration.

[The following three forms will not appear in the Code of Federal Regulations.]

BILLING CODE 4510-27-P



Labor Condition
Application
Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:



IMPORTANT: Please read these cover pages carefully before completing Form ETA 9035 - Labor Condition Application for H-1B nonimmigrants. These cover pages and instructions contain full explanations of attestations that you are required to make and are incorporated by reference into the form pages that you are required to complete and submit to ETA. A copy of these cover pages must be included in the public disclosure file and given to the H-1B nonimmigrant upon request.

Employers seeking to hire H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability must submit the completed and dated original Form ETA 9035 to the designated certifying officer in the Department of Labor (Department or DOL), Employment and Training Administration (ETA) Application Processing Center. ***Labor condition applications should be submitted to an ETA Application Processing Center via facsimile transmission (FAX to 1-800-397-0478) or via mail to P.O. Box 13640 * Philadelphia, PA * 19101.*** If the application is submitted by FAX, the application containing the original signature shall be maintained by the employer. An application which is complete and has no obvious inaccuracies will be certified by the Department and returned to the employer, who may then file it in support of its petition for an H-1B nonimmigrant with the Immigration and Naturalization Service (INS).

The completed form will be electronically scanned. To ensure the accuracy of readability and avoid rejections, it is preferred that the form be completed using the ETA 9035 program available from the U.S. Department of Labor's web site at <http://ows.doleta.gov>. If you hand write the form, print legibly in ink using a medium to thick pen. Print only in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form, use a font equivalent to 12-14 pt. Center each letter in the box and use only CAPITAL LETTERS. Be sure to sign and date the form. The regulatory citations below refer to 20 CFR part 655, subparts H and I.

To knowingly and willingly furnish any false information in the preparation of the Form ETA 9035 and any supporting documentation, or to aid, abet, or counsel another to do so is a federal offense, punishable by fine or imprisonment up to five years, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. 1546 and 1621).

OMB Notice

Paperwork Reduction Project 1205-0310

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (n)). Public reporting burden for this collection of information is estimated to average 1 hour per response, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210

Examples of how best to fill out Form ETA 9035

- A. For optimum accuracy, please print in capital letters and avoid contact with the edge of the box.

The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

- B. For optimum accuracy, please print carefully and avoid contact with the edges of the box. The following will serve as an example:

1	2	3	4	5	6	7	8	9	0
---	---	---	---	---	---	---	---	---	---

- C. Shade Circles Like This--> ●

Not Like This-->  





Labor Condition
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Instructions for Section A

Employers Information

1. Return Fax Number: If you want the application to be returned via facsimile transmission, enter the fax number, area code first, to which you want the Department to send the final determination on the application. This may be the fax number of a person or entity other than the employer (e.g., an attorney or agent). **If you want the application mailed, leave the Return Fax Number blank.**
2. Employer's Full Legal Name: Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents. Some abbreviation may be required for long names.
3. Employer's Address: Enter the address of the employer's principal place of business.
4. Employer's City, State, and Zip/Postal Code: Self - Explanatory
5. Employer's EIN Number: Enter the employer's Federal Employer Identification Number (EIN) (assigned by the Internal Revenue Service) (9 digits).
6. Employer's Phone Number and Extension: Enter the phone number, area code first, and extension, as appropriate, of the hiring or other designated official listed in Section H.

Instructions for Section B

Rate of Pay

1. Wage Rate (or Rate From) (Required): Enter the wage rate to be paid to H-1B nonimmigrants. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.
2. Rate Up To (Optional): Enter the top of the wage range to be paid to H-1B nonimmigrants.
3. Rate is Per: Enter whether the rate of pay is in terms of per year, month, two weeks, week, or hour.
4. Is this position part-time? Mark "Yes" or "No". If the position is part-time, the employer attests that the H-1B nonimmigrant(s) supported by the LCA will not regularly work more than the number of hours indicated (which may be a range of hours) on the INS Form(s) I-129 filed for the nonimmigrant(s). **Note: All H-1B nonimmigrants under the LCA must be part-time if question 4 is marked "Yes"; all H-1B nonimmigrants must be full-time if question 4 is marked "No".**

Instructions for Section C

Period of Employment and Occupation Information

1. Begin Date: Enter the beginning date (month, date, and 4 digit year) on which the H-1B nonimmigrant(s) will be employed under this application. For example, June 5, 2000 would be entered as 06-05-2000.
2. End Date: Enter the end date (month, date, and 4 digit year) on which the H-1B nonimmigrants will be employed. For example, June 5, 2000 would be entered as 06-05-2000.
3. Occupational Code: Enter the 3 digit code from Appendix 1 which most clearly describes the occupation to be performed.
4. Number of H-1B nonimmigrants: Enter the number of H-1B nonimmigrants that will be employed under this application. Use only numerals. Do NOT spell out the number: e.g., enter "001," not "ONE".
5. Job Title: Self - Explanatory



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nonimmigrants - Form ETA 9035.





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Instructions for Section D

Information relating to Work Location for the H-1B nonimmigrant

1. City and State: Enter the city and state of the physical location where the work will actually be performed. See definition of "place of employment" in 20 CFR 655.175 and regulation concerning short-term placement in 20 CFR 655.735.
2. Prevailing Wage: Enter the prevailing wage rate. If the position is part-time, enter the prevailing wage on an hourly basis.
3. Wage is Per: Enter whether the prevailing wage is expressed in terms of per year, month, two weeks, week, or hour.
4. Wage Source: If the employer is relying on a wage determination obtained from a State Employment Security Agency, mark the SESA box. If the employer is using a collective bargaining agreement, mark that box. If the employer is using another source, mark the "Other" box and specify such other source in the space provided (question 6). This other source must be an appropriate survey. It may NOT be an established pay scale which has not been negotiated.
5. Year: Enter the 4 digit year in which the "other source" wage survey was published.
6. Other Wage Source: Enter the name of the published wage survey or other source used to determine the prevailing wage: e.g., "BLS Occupational Compensation Survey, Denver," "employer-conducted survey," etc. Any "other source" survey must meet all the criteria set forth in 20 CFR 655.731 (b) (3) (iii) (B) or (C), as appropriate.

Instructions for Section D - Subsection A

Information for Additional or Subsequent Work Location

Subsection A of Section D is only necessary if filing for more than one location

If H-1B nonimmigrants are to be employed concurrently or sequentially in more than one location, fill out Subsection A using the instructions listed above for Section D.

Instructions for Section E

Employer Labor Condition Statements

The employer must read and agree to statements (1) through (4) below and demonstrate that agreement by marking "Yes" in Section E of Form ETA 9035 and by signing the application form. The employer agrees to develop and maintain documentation supporting labor condition statements (1) and (4) as specified in 20 CFR 655.731 and 655.734, and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business, as specified in Item G.

1. Wages: The employer attests that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment. By marking "Yes" in section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035), the employer also attests that it will pay H-1B nonimmigrants the required wage for time in nonproductive status due to a decision of the employer or due to the H-1B nonimmigrant's lack of a permit or license. The employer further attests that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. workers. See 20 CFR 655.731.

Instructions for Section E are continued on page 4



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**Continued Instructions for Section E
Employer Labor Condition Statements**

2. **Working Conditions:** The employer attests that the employment of H-1B nonimmigrants in the named occupation will not adversely affect the working conditions of workers similarly employed. The employer further attests that H-1B nonimmigrants will be afforded working conditions on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers. See 20 CFR 655.732.
3. **Strike, Lockout, or Work Stoppage:** The employer attests that on the date the application is signed and submitted, there is not a strike, lockout, or work stoppage in the course of a labor dispute in the named occupation at the place of employment and that, if such a strike, lockout, or work stoppage occurs after the application is submitted, the employer will notify ETA within three (3) days of such occurrence and the application will not be used in support of a petition filing with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike, lockout, or work stoppage has ceased. See 20 CFR 655.733.
4. **Notice:** The employer attests that as of the date of filing, notice of the labor condition application has been or will be provided to workers employed in the named occupation. Notice of the application shall be provided to workers through the bargaining representative, or where there is no such bargaining representative, notice of the filing shall be provided either through physical posting in conspicuous locations where H-1B nonimmigrants will be employed, or through electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought. The employer also attests that each H-1B nonimmigrant employed pursuant to the application will be provided with a copy of the certified Form ETA 9035, and provided with a copy of ETA 9035CP if requested. This notification shall be provided no later than the date the H-1B nonimmigrant reports to work at the place of employment. See 20 CFR 655.734.

! Please note that you have read and agree to these conditions by marking "Yes" in Section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).

**Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements**

Notice To Employers: If an employer is or becomes H-1B dependent or is found to have committed a willful violation or a misrepresentation of a material fact, any labor condition application for H-1B nonimmigrants that was certified by the Department of Labor prior to January 19, 2001 will be deemed invalid and may not be used in support of a new petition or an extension of a petition for an H-1B nonimmigrant.

Please Note: The determination as to whether an employer is H-1B dependent is a function of the number of H-1B nonimmigrants employed as a proportion of the total number of full-time equivalent employees employed in the U.S. The following table can be used to determine whether the employer is or is not H-1B dependent:

An employer is H-1B dependent if it employs in the U.S.:	
Number of Full-Time Equivalent Employees (U.S. and H-1B workers):	Number of H-1B Nonimmigrant Employees:
1 to 25	8 or more
26 to 50	13 or more
51 or more	15% or more of workforce (U.S. and H-1B workers).

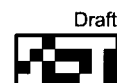
See 20 CFR 655.736 for more detailed guidance as to what constitutes an "H-1B dependent employer" or a "willful violator".

Instructions for Section F - Subsection 1 are continued on page 5



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**Continued Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements**

- !** All employers are required to choose one of the following alternatives. Please note the alternative chosen by marking A, B, or C in section F - Subsection 1 of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).

Alternative A - The employer is not H-1B dependent (as defined above) and has not been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998). The employer agrees to maintain the documentation required by 20 CFR 655.736 where applicable.

If an employer chooses Alternative A and is or becomes H-1B dependent or was found, prior to the date of filing, to have committed a willful violation or a misrepresentation, the submitted labor application shall be deemed invalid and may not be used in support of a new petition or extension of a petition for an H-1B nonimmigrant. By choosing Alternative A, the employer also acknowledges that if it uses this application despite its invalidity, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2.

Alternative B - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact.

- !** If Alternative B is chosen, Section F - Subsection 2 of Form ETA 9035 MUST be filled out.

Alternative C - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the submittal date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact, BUT the employer will use this labor condition application ONLY in support of petitions or extensions of status for exempt H-1B nonimmigrants who will receive wages at a rate equal to at least \$60,000 per year, or have attained a master's degree (or equivalent or higher degree) in a specialty related to the employment. The employer also agrees to maintain documentation required by 20 CFR 655.737.

By Choosing Alternative C, the employer acknowledges that if it uses this application in support of a petition or extension of a petition of an H-1B nonimmigrant who is not exempt, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2 with respect to all H-1B nonimmigrants supported by this application.

**Instruction for Section F - Subsection 2
Additional Employer Labor Condition Statements**

All employers (1) that are H-1B dependent (as defined above) and/or (2) that have been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998), **must read and agree to statements (A) through (C) below and demonstrate that agreement by marking "Yes" in Section F - Subsection 2 of Form ETA 9035 and by signing the application form.** The employer agrees to develop and maintain documentation supporting labor condition statements (A), (B), and (C) as specified in 20 CFR 655.738 and 655.739 and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business as identified in Item A. In addition, the employer agrees to maintain documentation supporting compliance with requirements on:

Instructions for Section F - Subsection 2 are continued on page 6

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Instruction for Section F - Subsection 2

Additional Employer Labor Condition Statements

- (A) Displacement: The employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a petition for an H-1B nonimmigrant supported by the application. See 20 CFR 655.738.
- (B) Secondary Displacement: The employer will not place any H-1B nonimmigrant employed pursuant to this application with any other employer or at another employer's worksite UNLESS the employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer applicant has no contrary knowledge.

If the other employer displaces a similarly employed U.S. worker during such period, the displacement will constitute a failure to comply with the terms of the labor condition application and the employer applicant may be subject to civil money penalties and debarment. See 20 CFR 655.738.

- (C) Recruitment and Hiring: Prior to filing any petition for an H-1B nonimmigrant pursuant to this application, the employer took or will take good faith steps meeting industry-wide standards to recruit U.S. workers for the job for which the nonimmigrant is sought, offering compensation at least as great as required to be offered to the H-1B nonimmigrant. The employer will (has) offer(ed) the job to any U.S. worker who (has) applied and is equally or better qualified than the H-1B nonimmigrant. See 20 CFR 655.739.

This labor condition statement "C" does not apply to the employment of an H-1B nonimmigrant who is a "priority worker" (defined as a person with extraordinary ability, or outstanding professors or researchers, or certain multi-national executives or managers) within the meaning of Section 203 (b)(1)(A), (B), or (C) of the Immigration and Nationality Act, 8 U.S.C. 1153.

Instructions for Section G

Public Disclosure Information

Mark the appropriate circle identifying where documentation concerning this application will be maintained.

Instructions for Section H

Declaration of Employer

- ! The application must be signed by an official designated by the employer and authorized by the employer to agree to the statements herein on the employer's behalf.**

False statements are subject to Federal criminal penalties, as stated above. Failure to meet a condition of the application or misrepresentation of a material fact may result in civil money penalties, debarment, and other appropriate relief.

Instructions for Section I

Contact Information

Enter information in this section only if the person to whom questions regarding this application should be directed is different from the hiring or other designated official signing the application on behalf of the employer.

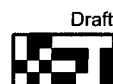
1. Contact First Name and Middle Initial (MI): Self-Explanatory
2. Contact Last Name: Self-Explanatory
3. Contact Phone Number and Extension: Self-Explanatory



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Labor Condition
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Appendix 1
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Architecture, Engineering, and Surveying

- 001 ARCHITECTURAL OCCUPATIONS
- 002 AERONAUTICAL ENGINEERING OCCUPATIONS
- 003 ELECTRICAL/ELECTRONICS ENGINEERING OCCUPATIONS
- 005 CIVIL ENGINEERING OCCUPATIONS
- 006 CERAMIC ENGINEERING OCCUPATIONS
- 007 MECHANICAL ENGINEERING OCCUPATIONS
- 008 CHEMICAL ENGINEERING OCCUPATIONS
- 010 MINING AND PETROLEUM ENGINEERING OCCUPATIONS
- 011 METALLURGY AND METALLURGICAL ENGINEERING OCCUPATIONS
- 012 INDUSTRIAL ENGINEERING OCCUPATIONS
- 013 AGRICULTURAL ENGINEERING OCCUPATIONS
- 014 MARINE ENGINEERING OCCUPATIONS
- 015 NUCLEAR ENGINEERING OCCUPATIONS
- 017 DRAFTERS
- 018 SURVEYING/CARTOGRAPHIC OCCUPATIONS
- 019 OTHER OCCUPATIONS IN ARCHITECTURE, ENGINEERING, AND SURVEYING

Occupations in Mathematics and Physical Sciences

- 020 OCCUPATIONS IN MATHEMATICS
- 021 OCCUPATIONS IN ASTRONOMY
- 022 OCCUPATIONS IN CHEMISTRY
- 023 OCCUPATIONS IN PHYSICS
- 024 OCCUPATIONS IN GEOLOGY
- 025 OCCUPATIONS IN METEOROLOGY
- 029 OTHER OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

Computer - Related Occupations

- 030 OCCUPATIONS IN SYSTEMS ANALYSIS AND PROGRAMMING
- 031 OCCUPATIONS IN DATA COMMUNICATIONS AND NETWORKS
- 032 OCCUPATIONS IN COMPUTER SYSTEM USER SUPPORT
- 033 OCCUPATIONS IN COMPUTER SYSTEM TECHNICAL SUPPORT
- 039 OTHER COMPUTER-RELATED OCCUPATIONS

Occupations in Life Sciences

- 040 OCCUPATIONS IN AGRICULTURAL SCIENCES
- 041 OCCUPATIONS IN BIOLOGICAL SCIENCES
- 045 OCCUPATIONS IN PSYCHOLOGY
- 049 OTHER OCCUPATIONS IN LIFE SCIENCES

Occupations in Social Sciences

- 050 OCCUPATIONS IN ECONOMICS
 - 051 OCCUPATIONS IN POLITICAL SCIENCE
 - 052 OCCUPATIONS IN HISTORY
 - 054 OCCUPATIONS IN SOCIOLOGY
 - 055 OCCUPATIONS IN ANTHROPOLOGY
 - 059 OTHER OCCUPATIONS IN SOCIAL SCIENCES
-



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Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Medicine and Health

- 070 PHYSICIANS AND SURGEONS
- 071 OSTEOPATHS
- 072 DENTISTS
- 073 VETERINARIANS
- 074 PHARMACISTS
- 075 REGISTERED NURSES
- 076 THERAPISTS
- 077 DIETICIANS
- 078 OCCUPATIONS IN MEDICAL AND DENTAL TECHNOLOGY
- 079 OTHER OCCUPATIONS IN MEDICINE AND HEALTH

Occupations in Education

- 090 OCCUPATIONS IN COLLEGE AND UNIVERSITY EDUCATION
- 091 OCCUPATIONS IN SECONDARY SCHOOL EDUCATION
- 092 OCCUPATIONS IN PRESCHOOL, PRIMARY SCHOOL, AND KINDERGARTEN EDUCATION
- 094 OCCUPATIONS IN EDUCATION OF PERSONS WITH DISABILITIES
- 096 HOME ECONOMISTS AND FARM ADVISERS
- 097 OCCUPATIONS IN VOCATIONAL EDUCATION
- 099 OTHER OCCUPATIONS IN EDUCATION

Occupations in Museum, Library, and Archival Sciences

- 100 LIBRARIANS
- 101 ARCHIVISTS
- 102 MUSEUM CURATORS AND RELATED OCCUPATIONS
- 109 OTHER OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

Occupations in Law and Jurisprudence

- 110 LAWYERS
- 111 JUDGES
- 119 OTHER OCCUPATIONS IN LAW AND JURISPRUDENCE

Occupations in Religion and Theology

- 120 CLERGY
- 129 OTHER OCCUPATIONS IN RELIGION AND THEOLOGY

Occupations in Writing

- 131 WRITERS
- 132 EDITORS: PUBLICATION, BROADCAST, AND SCRIPT
- 139 OTHER OCCUPATIONS IN WRITING

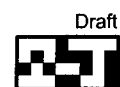
Occupations in Art

- 141 COMMERCIAL ARTISTS: DESIGNERS AND ILLUSTRATORS, GRAPHIC ARTS
- 142 ENVIRONMENTAL, PRODUCT, AND RELATED DESIGNERS
- 149 OTHER OCCUPATIONS IN ART



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Labor Condition
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Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Entertainment and Recreation

- 152 OCCUPATIONS IN MUSIC
- 159 OTHER OCCUPATIONS IN ENTERTAINMENT AND RECREATION

Occupations in Administrative Specializations

- 160 ACCOUNTANTS, AUDITORS, AND RELATED OCCUPATIONS
- 161 BUDGET AND MANAGEMENT SYSTEMS ANALYSIS OCCUPATIONS
- 162 PURCHASING MANAGEMENT OCCUPATIONS
- 163 SALES AND DISTRIBUTION MANAGEMENT OCCUPATIONS
- 164 ADVERTISING MANAGEMENT OCCUPATIONS
- 165 PUBLIC RELATIONS MANAGEMENT OCCUPATIONS
- 166 PERSONNEL ADMINISTRATION OCCUPATIONS
- 168 INSPECTORS AND INVESTIGATORS, MANAGERIAL AND PUBLIC SERVICE
- 169 OTHER OCCUPATIONS IN ADMINISTRATIVE OCCUPATIONS

Managers and Officials

- 180 AGRICULTURE, FORESTRY AND FISHING INDUSTRY MANAGERS AND OFFICIALS
- 181 MINING INDUSTRY MANAGERS AND OFFICIALS
- 182 CONSTRUCTION INDUSTRY MANAGERS AND OFFICIALS
- 183 MANUFACTURING INDUSTRY MANAGERS AND OFFICIALS
- 184 TRANSPORTATION, COMMUNICATION, AND UTILITIES INDUSTRY MANAGERS AND OFFICIALS
- 185 WHOLESALE AND RETAIL TRADE MANAGERS AND OFFICIALS
- 186 FINANCE, INSURANCE, AND REAL ESTATE MANAGERS AND OFFICIALS
- 187 SERVICE INDUSTRY MANAGERS AND OFFICIALS
- 188 PUBLIC ADMINISTRATION MANAGERS AND OFFICIALS
- 189 MISCELLANEOUS MANAGERS AND OFFICIALS

Miscellaneous Professional, Technical, and Managerial Occupations

- 195 OCCUPATIONS IN SOCIAL AND WELFARE WORK
- 199 MISCELLANEOUS PROFESSIONAL, TECHNICAL, AND MANAGERIAL OCCUPATIONS

Sales Promotion Occupations

- 297 FASHION MODELS

Miscellaneous

- 137 INTERPRETERS AND TRANSLATORS
- 143 OCCUPATIONS IN PHOTOGRAPHY
- 144 FINE ARTISTS
- 150 OCCUPATIONS IN DRAMATICS
- 151 OCCUPATIONS IN DANCING
- 153 OCCUPATIONS IN ATHLETICS AND SPORTS
- 191 AGENTS AND APPRAISERS
- 193 RADIO OPERATORS
- 194 SOUND, FILM
- 196 AIRPLANE PILOTS
- 197 SHIP CAPTAINS
- 198 RAILROAD CONDUCTORS



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**Labor Condition
Application for H-1B
Nonimmigrants**

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035

OMB Approval:
Expiration Date:

D. Subsection A Information For Additional or Subsequent Work Location

! This Section should be completed only if filing for more than 1 work location.

1. City

 , State

2. Prevailing Wage \$

 .

3. Wage is Per:
☐ Year ☐ Week ☐ Month ☐ Hour ☐ 2 Weeks

4. Wage Source **!** If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.
☐ SESA ☐ Collective Bargaining Agreement ☐ Other

5. Year

6. Other Wage Source

E. Employer Labor Condition Statements

! Please Note: In order for your application to be processed, you MUST read section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:

- (1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.
- (2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.
- (3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.
- (4) Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B workers.

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages. ☐ Yes ☐ No

F. Additional Employer Labor Condition Statements

! Please Note: In order for your application to be processed, you MUST read Section F - Subsections 1 and 2 of the Labor Condition Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection 1. If you mark Alternative B, you MUST read Section F - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 4 additional statements summarized below in Subsection 2.

1. Subsection 1

Choose ONE of the following 3 alternatives:

- A ☐ Employer is not H-1B dependent and is not a willful violator.
- B ☐ Employer is H-1B dependent and/or a willful violator.
- C ☐ Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.

2. Subsection 2

If Alternative B in Subsection 1 is marked, the following Additional Labor Condition Statements are applicable:

- A. Displacement: Non-displacement of the U.S. workers in employer's work force;
- B. Secondary Displacement: Non-displacement of U.S. workers in another employer's work force; and
- C. Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).

I have read and agree to Additional Labor Conditional Statements 2 A, B, and C. ☐ Yes ☐ No

Page Link

! If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.

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Form ETA 9035
OMB Approval:
Expiration Date:

! You must choose one of the two options listed in this Section.

☐ Employer's principal place of business

☐ Place of employment

By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this application, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.

4. Signature - Do NOT let signature extend beyond the box

Extension

ETA Case Number	Date
-----------------	------

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor application may be filed with any office of the Wage and Hour Division of the United States Department of Labor. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with: U.S. Department of Justice * 10th Street and Constitution Avenue, NW * Washington, DC * 20530.

! If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.



H-1B Nonimmigrant
Information FormU.S. Department of Labor
Employment Standards AdministrationESA Form WH-4
OMB Approval:
Expiration Date:

This report is authorized by 8 U.S.C. 1182(n)(2)(G)(ii) of the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998. The information provided on this form will assist the Department of Labor in determining whether the named employer of H-1B nonimmigrants has committed a violation of provisions of the H-1B program. Your identity will be kept confidential to the fullest extent provided by law. Please provide as much of the requested information as possible. Attach additional sheets if you need additional space to respond to a question. If you do not understand a term, or need assistance in the completion of this form, please contact the local Wage and Hour office of the U.S. Department of Labor. After you submit the form, a representative from the Department of Labor may contact you if further information is necessary to initiate an investigation.

1. Person Submitting Information *(please print)*Mr., Miss, Mrs., Ms. _____
First Name Middle Initial Last NameCurrent Address: _____
Number, Street, Apt. or P.O. Box No.

City, State, ZIP CodeTelephone Number: *(including area code)* _____

Days/Times When You Can be Reached at that Number: _____

E-Mail Address (optional): _____

2. Nature of Source's Relationship to Employer: *(Please check all that apply)*

- (a) ☐ H-1B Nonimmigrant Employee
☐ Former or ☐ Current Employee *(dates of employment):* _____
- (b) ☐ U.S. Worker
☐ Former or ☐ Current Employee *(dates of employment):* _____
- (c) ☐ Job Applicant *(date of application):* _____
- (d) ☐ Competitor Business *(please specify):* _____
- (e) ☐ Federal Government Agency *(please specify):* _____
- (f) ☐ State or Local Government Agency *(please specify):* _____
- (g) ☐ Community or Service Organization *(please specify):* _____
- (h) ☐ Other *(please specify):* _____

3. Information on H-1B Employer Committing Alleged Violation

Name of Employer/Company: _____

Address: _____
Number, Street City State ZIP Code

Employer Representative to be Contacted: _____

Telephone Number (including area code): _____

4. Description of Alleged H-1B Violations

Please check the appropriate box(es), (a) through (q), which best describe the violation of the H-1B provisions of the Immigration and Nationality Act which you believe have occurred. In section 8, identify each item checked and describe, in as much detail as possible, the facts and circumstances which cause you to believe that violations have occurred.

- (a) ☐ Employer supplied incorrect or false information on the Labor Certification Application (LCA).
- (b) ☐ Employer failed to pay H-1B worker(s) the higher of the prevailing or actual wage.
- (c) ☐ Employer failed to pay H-1B worker(s) for time off due to a decision by the employer (e.g., for lack of work) or for time needed by the H-1B worker(s) to acquire a license or permit.
- (d) ☐ Employer made illegal deductions from H-1B worker's wages (e.g., for H-1B petition processing; for food and housing expenses while the worker is traveling on employer's business; for tools and equipment necessary to perform employer's work).
- (e) ☐ Employer failed to provide fringe benefits to H-1B worker(s) equivalent to those provided to U.S. worker(s) (e.g., cash bonuses, stock options, paid vacations and holidays, health benefits, insurance, retirement and savings plans).
- (f) ☐ Employer does not afford H-1B worker(s) working conditions (hours, shifts, vacation periods) on the same basis as it does U.S. worker(s), or the employment of H-1B worker(s) adversely affects the working conditions of U.S. worker(s).
- (g) ☐ Employer failed to comply with "no strike/lockout" requirement by: 1) placing or contracting out H-1B worker(s) during the validity period of the LCA to any place of employment where there is a labor dispute; 2) failing to notify the DOL, within 3 working days of the occurrence, of such a labor dispute; or 3) using an LCA for H-1B worker(s) to work at a site before the DOL has determined that a labor dispute has ended.
- (h) ☐ Employer failed to provide employees or their collective bargaining representative, either by hard copy posting or electronically, notice of its intentions to hire H-1B worker(s); or has failed to provide H-1B worker(s) with a copy of the LCA.
- (i) ☐ Employer required H-1B worker(s) to pay all or any part of \$500/\$1000 filing fee.
- (j) ☐ Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.
- (k) ☐ Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e., whistleblower).
- (l) ☐ Employer failed to maintain and make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite.
- (m) ☐ Employer laid off U.S. worker(s) and has replaced or seeks to replace U.S. worker(s) with H-1B worker(s) within 90 days before or after filing H-1B visa petitions.
- (n) ☐ Employer placed H-1B worker(s) at another employer's worksite where U.S. workers have been laid off; and/or has failed to inquire of the second employer whether it has or intends to lay-off U.S. worker(s) and replace them with H-1B worker(s).

(o) ☐ Employer failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought.

(p) ☐ Employer failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought. Complaints regarding this violation should be filed with the U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C., 20530.

(q) ☐ Other _____

____ 5. Date(s) of Alleged Violation(s): _____

6. Location of Worksite(s) where Alleged Violation(s) occurred: _____

7. Basis of Knowledge of Alleged Violation(s): _____

8. Description of facts and circumstances which support allegations in items 4 (a) through (q). Use additional sheets of paper, if necessary.

FOR DOL USE ONLY

Complaint Received/Taken by: _____ Date: _____

Source of Complaint is: ☐ Aggrieved Party ☐ Credible information source

Public Burden Statement: We estimate that it will take an average of 20 minutes to complete this form, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the U.S. Department of Labor, Wage and Hour Division, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.